

No. 11707

United States
Circuit Court of Appeals
For the Ninth Circuit

CONTINENTAL CASUALTY COMPANY, a Corporation,
Appellant,

vs.

M. C. SCHAEFER, an Individual doing business as
CONCRETE CONSTRUCTION COMPANY,
Appellee.

and

A. J. GOERIG and CLYDE PHILP,
Appellants,

vs.

CONTINENTAL CASUALTY COMPANY, a Corporation,
Appellee.

and

SAM MACRI, DON MACRI and JOE MACRI,
Appellants,

vs.

M. C. SCHAEFER, an Individual doing business as
CONCRETE CONSTRUCTION COMPANY,
Appellee.

Transcript of Record
In Five Volumes
VOLUME IV
Pages 1429 to 1908

Upon Appeals from the District Court of the United States
for the Eastern District of Washington
Southern Division

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(Testimony of Sam Macri.)

Q. And what type or types of equipment, if you remember, were Osberg and Ludberg using at that time?

A. Well, they had several pieces of equipment. It was on the big canal. They had a big drag-line for digging dirt, and they had a shovel, and some trucks.

Q. Mr. Macri, did you make your own estimate for bidding 1062, schedule 1, or was it made for you?

A. No, I make my own bid.

Q. Do you have with you the estimate that you made at that time? Did you bring it here to Court?

A. No.

Q. Is it over at the hotel, or do you have it? Do you have a copy of the estimate that you made at that time, Mr. Macri?

A. You mean the pencil copy?

Q. I mean the actual estimate, what comprised the component parts of the estimate. Do you have that over here, the work sheets? Do you have them, or not?

A. Well, I don't recall; I can't say, unless it's in my brief case.

Q. Will you during the noon hour try to find that?

A. Yes. I wouldn't say if I got that or not.

Q. During the noon hour will you try to find that out?

A. I'll be glad to.

Mr. Holman: I would like to pause at that point.

The Court: We'll recess until 1:30.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

Yakima, Washington, Wednesday, March 12, 1947
1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, counsel advises me he has not yet received his copy of Mr. Nelson's deposition, and while I would prefer to read that at this time, in orderly proof, I would like to accommodate counsel, and I shall hold that for the time being, at least, and I understand, Mr. Olson, if it does come it will be brought over here?

Mr. Olson: Yes, I left instructions at the office that it be brought over immediately.

SAM MACRI

a witness called on behalf of the defendants Macri, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Holman:

Q. Mr. Macri, did you try during the noon hour to locate any original figures you made on the estimate, you yourself made?

A. Yes, I looked, but I haven't got them.

Q. You haven't them over at the hotel? [1572]

A. No.

Q. Can you tell me from memory whether or not in your preparation of the various units which made up your bid, you made an estimate of the quantity of lumber you determined as reasonably a maximum

(Testimony of Sam Macri.)

for performance of the item 12, concrete construction, as shown by plaintiff's Exhibit 3, and I'll show you what I mean here, from the exhibit, referring to item 12 of plaintiff's Exhibit 3, concrete structures, estimated 1515 cubic yards; now, what I'm asking you is whether or not in your estimate you determined the maximum quantity of lumber that you used to arrive at your bid amount?

Mr. Olson: Now just a minute. We object to that, your Honor, as being immaterial and irrelevant, what figure Mr. Macri took into consideration and what he figured in his estimate as to the amount of quantity that would be used.

Mr. Holman: Your Honor, I would like to requalify the question a little before your Honor rules on that.

The Court: All right.

Q. Mr. Macri, have you had previous opportunities to estimate jobs, including the use of lumber in connection with concrete? A. Yes. [1573]

Q. And has that experience been over a considerable time, or a limited time?

A. Time to time.

Q. Time to time, yes. Well, did you estimate a maximum quantity of lumber to become a component part of the performance of this item 12?

A. Yes, I did.

Q. And will you tell me whether or not you remember that? Don't say what it is. Tell me whether you do remember it or not.

A. Yes, I remember it.

(Testimony of Sam Macri.)

Mr. Holman: Now, I submit, your Honor, that the question previously asked is sufficiently qualified.

The Court: Is the purpose of this to show what in his opinion as an expert construction man and contractor was reasonably necessary to do the work here?

Mr. Holman: Yes, as a maximum of lumber, yes.

The Court: I don't know; I suppose what he estimated would be necessarily assumed as his opinion of what was necessary. Is that the purpose for which it is offered?

Mr. Holman: Yes.

Mr. Olson: That's the basis of my objection. He hasn't asked him that. He's asked him what figure he used in his estimate. [1574]

The Court: It seems to me the amount he furnished would be material, rather than the estimate, unless the estimate was put in as his opinion of what was required, as an expert.

Mr. Holman: I'll ask you, Mr. Holman—I don't believe I care to qualify Mr. Macri as an expert, your Honor, as he is principal defendant. I doubt if I wish to do that.

The Court: All right.

Direct Examination

(Continued)

By Mr. Holman:

Q. And in making your bid for item 12, concrete structure, did you keep in mind that quantity of

(Testimony of Sam Macri.)

lumber that would be required, in your opinion, for the performance of the job? A. I did.

Q. Now, Mr. Macri, with reference to the units bid as shown by schedule 1 in Exhibit 3, I'll ask you if you could very briefly indicate to the Court those units you bid upon which were correlated or part of the plan of the structure excavation and concrete structures; just call the numbers.

A. Well, number 1, that's excavation, common.

Q. Was that involved? A. No.

Q. Well, you mis-understood my question, Mr. Macri. I want [1575] you to indicate to the Court those that were involved in the performance of the concrete structure, as to the units.

A. That's item 7, is what is involved in the concrete structures.

Q. What is that item?

A. That's excavation common for structures.

Q. Now, how many cubic yards of excavation of common for structures were in the preliminary estimate as shown by that?

Mr. Olson: Your Honor, the preliminary estimate speaks for itself on that, I think.

Mr. Holman: Well, it does, your Honor, and I can read it into the record.

The Court: It is in evidence.

Q. Well, was that the quantity of excavation you figured upon? A. Yes.

Q. And your bid was for how much?

A. 50 cents a cubic yard.

Q. And how many yards did you figure upon there?

(Testimony of Sam Macri.)

Mr. Olson: The same objection, your Honor. It doesn't have any bearing what Mr. Macri figured on.

Mr. Holman: Well, these are his bids, your Honor.

The Court: I don't see the materiality of it.

Mr. Holman: I'm merely directing your Honor's attention to the particular units, and I can do it without the witness, your Honor.

The Court: Well, why not do it that way?

Mr. Holman: Very well. I'm calling your Honor's attention at this time to exhibit 3 as the items involved in connection with item 12: Item 7, excavation common for structures, estimated 8250 cubic yards, and a bid price of 50 cents per cubic yard, or a total amount of that unit bid, \$4,125.00; item 8, excavation, rock, for structures, 200 estimated cubic yards, a bid price of \$3.00 per cubic yard, or \$600.00; item 9, back-fill about structures, 8650 cubic yards at 25 cents per cubic yard, or an estimated amount total of \$2,162.50; item 10, puddling or tamping back-fill about structures, 3300 estimated cubic yards, a bid price of 40 cents, or \$1,320.00, was the amount of that unit bid; item 12, concrete in structures, 1515 cubic yards at \$35.00 per cubic yard, or a total for that item of \$53,025.00; item 13, placing re-inforcement bars, 12,700 estimated pounds at 3 cents per pound, \$381.00; item 15, erecting timber in structures, estimated 10,000 feet board measure, at \$45.00 per thousand board feet measure, or \$450.00; item 16, installing gates and miscellaneous metal work, 13,000 pounds at 5

(Testimony of Sam Macri.)

cents a pound, or \$650.00 for that unit; and the other items relate to other operations. [1577]

The Court: Yes, all right.

Mr. Holman: And similarly, your Honor, without detailing the units, other than calling the number, since the bid prices are mentioned here in exhibit 4, plaintiff's exhibit 4, I would direct your Honor's attention to item 7, item 8, item 9, item 10, item 12, item 13, item 15, and item 16.

The Court: That's on 1068?

Mr. Holman: Yes, your Honor, and parenthetically, in my opening statement, I forgot about those incidental items as covered by the Concrete Construction Company contract.

Direct Examination
(Continued)

By Mr. Holman:

Q. I will ask you whether or not in advance of making your bid for specification 1062, schedule 1, you had any conversation with Mr. H. T. Nelson, the engineer of the Bureau, with respect to requirement of slopes? Just tell me yes or no, that's all; did you? A. No.

Q. Sir? A. No.

Q. You did not. And did you have any conversation with Mr. Nelson with respect to the pay limits for excavation? A. Yes.

Q. All right, don't say what it was. Now, will you tell me [1578] whether or not in advance of

(Testimony of Sam Macri.)

signing the contract in evidence, the sub-contract in evidence between Mr. Schaefer and yourself, you communicated to Mr. Schaefer what you had talked with Mr. Nelson? Did you, or did you not, about that? Do you know what I'm asking about, Mr. Macri? A. The slope?

Q. Yes; did you talk with him about the excavation, the pay limits? Did you talk to Mr. M. C. Schaefer about that before the sub-contract was signed?

A. No, we never talked about the slope.

Q. You did not talk to Mr. Schaefer about that. Did you talk to him about any of the pay quantities?

A. Not with Mr. Schaefer.

Q. Well, that's what I'm talking about, in advance of signing the sub-contract. All right, sir. When did you first contact Mr. Schaefer or Mr. Schaefer contact you? When was the first time you had any communication between you and Mr. Schaefer, Mr. M. C. Schaefer, I'm talking about, unless I indicate otherwise.

A. Well, it was during the first part of March.

Q. How was the contact made? What was it, Mr. Macri?

A. I think Mr. Schaefer called me up to make an appointment with me in Seattle.

Q. He called you from where, do you know?

A. I think it was from Portland, if I remember right.

Q. Yes, sir; and was an appointment made?

A. Yes.

(Testimony of Sam Macri.)

Q. In that conversation with Mr. Schaefer do you remember the substance of what was said, or not?

A. He say he received a letter from Mr. Staples, my superintendent, and was reported that he'd be interested in subbing some of that concrete in Yakima, and I told him that's all right with me, if he would be interested, and I remember he tell me it would be a day or two before he would come to see me in Seattle, and I told him that would be all right with me.

Q. Now, then, did Mr. Schaefer later come to see you in Seattle? A. Yes, he did.

Q. Where?

A. That was in the office, 905 10th South, Mr. Schaefer come over.

Q. That's 905 10th South?

A. Yes, that's where my office is.

Q. That's in Seattle? A. Yes.

Q. And did you have a talk with Mr. Schaefer at that time?

A. Yes, he come over and introduce himself, and also his brother was with him. [1580]

Q. When you say his brother, that is Mr. W. E. Schaefer, that's here? A. Yes.

Q. And do you remember what the substance of that conversation was, so you could tell the Court, or not; do you remember?

A. Yes. He say——

Q. When you say "he," you're speaking of M. C. Schaefer?

(Testimony of Sam Macri.)

A. M. C. did the talking. Of course he say he was from Concrete Construction, and he said he'd be much interested in subbing the concrete, and I told him that's all right with me, if he want to give a figure.

Q. Did he say whether or not prior to that he had been on the job at Sunnyside, do you remember?

A. Yes, I think he told me he come through Yakima and look the job over.

Mr. Olson: If the Court please, I think counsel should just ask this witness what the conversation was, and not try to suggest each thing to him.

Mr. Holman: I think I've fallen into counsel's error.

The Court: It is rather leading.

Direct Examination

(Continued)

By Mr. Holman:

Q. Will you give the substance of the conversation, the best you can remember, Mr. Macri, that conversation? [1581]

A. Yes, Mr. Schaefer say he went through Yakima and look the job over, and he'd be much interested in subbing on that concrete. I told him it would be all right with me, if he give a figure, and we agree, why, it's O.K., so I had a set of plans and specifications in the office, and I told him if he want to look them over, and he said yes, I would like to take this to Portland with me and come back and give you a figure.

(Testimony of Sam Macri.)

Q. Now, just a moment; when you say plans and specifications, I'll ask you whether you are referring to the plans and specifications covered by Exhibit 3? A. 1062, yes.

Q. All right. Did you furnish him with the plans and specifications?

A. Yes, sir, I did; he took them along with him in Portland.

Q. At that time did you have any of the lay-out drawings? A. No.

Q. Had the government at that time furnished you with lay-out drawings?

A. No, not then.

Q. And was there any other data or maps or information referred to at the time, do you recall?

A. No, the government they furnish us after we get to starting, they furnish us with large detail.

Q. When you started work? [1582]

A. Yes.

Q. Well, was there any price or figure quoted or suggested by you at the time of this first meeting with Mr. Schaefer in your office?

Mr. Olson: The same objection, your Honor.

(Whereupon, the reporter read the last previous question.)

Q. In other words, Mr. Macri, what I want to know is whether or not you specified any price to Mr. Schaefer at that time?

A. Oh, no, I never specified any price.

Q. I see; and in that conversation with Mr. Schaefer can you tell me whether or not the pro-

(Testimony of Sam Macri.)

posed proposal of sub-contracting the work was limited to any particular item or items?

Mr. Olson: That, your Honor, is objected to. If this witness wants to detail the conversation, and then let your Honor determine whether or not it was limited to anything, or what the effect of it was——

Mr. Holman: I think counsel's objection is well taken, your Honor.

The Court: I'll sustain the objection.

Mr. Holman: I'll withdraw the question.

Direct Examination

(Continued)

By Mr. Holman:

Q. Can you, as far as you possibly can remember, Mr. Macri, [1583] will you tell all of the conversation that occurred between you and Mr. M. C. Schaefer or Mr. William E. Schaefer at that time in your office, before he took these specifications and left?

A. Well, we was talking about he was interested in giving a figure on the concrete and form work, and told me he wanted to take those plans and specifications in Portland with him, so he can come back and give a figure.

Q. Now, then, you say he came back later and gave you a figure?

A. Yes, he came back and gave me a figure.

Q. The same day, or a different day, or what?

A. Oh, no, it was two or three days afterwards.

(Testimony of Sam Macri.)

Q. And when he came back do you recall where that meeting was? A. It was in the office.

Q. In your office? A. Yes.

Q. At this same address? A. Yes.

Q. And at that time was there any contract signed? A. No.

Q. You say Mr. Schaefer at that time gave you a figure, is that what you said? A. Yes.

Q. What do you recall was the figure that Mr. Schaefer gave you at that time?

A. Yes; first he give a figure of——

Mr. Olson: Your Honor, I don't see what materiality that has. We have a signed contract where the figure was ultimately made, and the price was fixed, unless I misunderstand the purpose.

Mr. Holman: I have in mind just this, your Honor. The signed contract has very evidently upon its face some alterations and some additions, and I'm merely trying to get that picture, have a clear explanation to your Honor of how that contract is that way.

The Court: Well, I'll overrule the objection.

Mr. Holman: Will you read the question?

(Whereupon, the reporter read the last previous question.)

A. Well, first he say he wanted \$30.00 a yard.

Q. How much? A. \$30.00 a yard.

Q. I'm sorry, I haven't yet heard you.

A. \$30.00.

Q. \$30.00? A. Yes.

Q. All right.

(Testimony of Sam Macri.)

A. For complete, everything, form lumber and everything, and [1585] I asked him "Why you want so much for it?"; well, he say, "you know, I got to pay for lumber about \$60.00 a thousand, and lumber cost me so much more, so that's the reason for it."

Q. Now, did you have any conversation with Mr. Schaefer with respect to the lumber itself, at that meeting?

A. Well, I told Mr. Schaefer then he probably won't be able to get that volume of lumber here locally, even if he pays \$60.00, because lumber is hard to get in Yakima, I already investigated myself, and if that's just what worry him, he got to pay \$60.00, I'll see you get the lumber cheaper than that.

Q. You're talking too fast.

A. I told Mr. Schaefer if it's just the lumber worrying him: I can get it cheaper to him.

Q. Did you explain to him why? A. Yes.

Q. What did you tell him?

A. I told him we had a priority, and we built a lot of defense house projects, and we also include so much lumber for this job.

Q. Did you tell him what housing project you had priority for at that time?

A. Yes, I told him first Stadium Homes, also some in Bremerton, some in Port Angeles, and we was able to get lumber [1586] for him.

Q. Now, I ask you specifically whether or not in that conversation you told Mr. M. C. Schaefer or

(Testimony of Sam Macri.)

William E. Schaefer that you had an interest in a lumber mill? A. No, sir.

Q. What, if anything, did you tell them with respect to a lumber mill?

A. I told Mr. Schaefer we furnished \$10,000.00 to some sawmill so it can supply us with \$10,000.00 worth of lumber. In other words, we pay cash in advance for \$10,000.00 worth of lumber to deliver to us.

Q. And in that conversation did you designate the lumber mill?

A. I don't remember; I don't tell him which mill, no.

Q. You didn't tell him which mill? A. No.

Q. What if anything else was said about lumber in that conversation with Mr. Schaefer?

A. Well, then he told me as long as I can get the lumber that way, for me to supply lumber. I told him "All right, give me your figure you want, and I'll supply lumber" and he gave me a figure of \$26.00.

The Court: The last figure I didn't get.

A. \$26.00.

Q. That's \$26.00 for what? [1587]

A. For me to furnish the lumber to him.

The Court: Per cubic yard, I presume.

Q. Was it \$26.00 per cubic yard?

A. Cubic yard, including reinforcing steel and the metal work and the concrete.

Q. Now, then, is it or is it not your statement the \$26.00 included performance of item 12, the

(Testimony of Sam Macri.)

concrete structures, item 13, placing reinforcement bars——

A. Yes.

Q. ——and item 16, installing gates?

A. Yes.

Q. Now, was there at that time any conference or any reference to item 15 in exhibit 3, erecting timber in structures?

A. No, not that time.

Q. And tell me, please, whether or not at the time of this conversation with Mr. Schaefer and his brother a contract was drawn up and signed?

A. After we got together with the price we drove to Stadium Home Office over there; we had another office there.

Q. Where was Stadium Home office?

A. It was a defense project, and we had an office there. We took care of all the purchasing and writing and everything in that office.

Q. Is that another part of Seattle, or not?

A. Oh, it's about, I judge, about a mile and a half from my original office, up on the hill.

Q. And who was over at the Stadium Home Project when you and Mr. Schaefer and his brother drove there?

A. All the office force, the bookkeeper and Mr. Hjorth was over there.

Q. Who?

A. Hjorth. He was our estimator, and he took care of that stuff.

Q. And his first name is Nels, is it, Mr. Macri?

A. Nels.

(Testimony of Sam Macri.)

Q. Will you tell me whether or not you introduced the two brother Schaefers to Mr. Hjorth?

A. I did.

Q. And will you tell the Court what conversation, if any, in which Mr. Hjorth also participated, occurred in that office before the contract was drawn?

A. Well, Mr. Hjorth, he did all the estimating, and also he prepared the additional words in the sub-contract. He handled all that kind of stuff himself.

Q. Now, tell me whether or not while you were at the Stadium Homes office a contract was prepared? Did you say Mr. Hjorth did it?

A. Well——

Q. How was it done? Just tell the Court how it was done. [1589]

A. After we got together we explained to Mr. Hjorth how they wanted those words, and the way he usually do, he mark with a pencil, and then he hand to the stenographer to type.

Q. Well, can you tell me whether or not he made that on one of these blank form sub-contracts, or not?

A. Yes, Mr. Hjorth did.

Q. Calling your attention to plaintiff's Exhibit 5, can you remember and tell me whether or not the typing at the bottom of page 1 and the typing in the portion at the top of page 2 was in that form when Mr. Hjorth had it typed, or were there subsequent changes? Can you tell me?

A. Well, this stuff was changed afterwards.

(Testimony of Sam Macri.)

Q. Now, when you say "This stuff was changed afterwards" will you indicate, please, what you mean by "this stuff"?

A. Well, that's some reinforcing steel. The subcontractor is supposed to furnish reinforcing steel.

Q. Yes, Mr. Macri, for the purpose of the record, you have indicated, have you not, a portion of the line directly below the word "describe" and over to the typewritten word on the line below reading "and," ahead of the word "necessary"?

A. Yes.

Q. Now, what you indicated is this portion which is X'd out, is that correct? [1590]

A. Well, there was some form lumber here, and I naturally agreed to furnish form lumber myself.

Q. Well, never mind the naturally; I'm asking whether or not this which is X'd out was in the form when Mr. Hjorth returned it.

A. What do you mean?

Q. Well, when it was brought back typed.

A. Well, yes, then Mr. Schaefer read it over in there.

Q. All right, then similarly with reference to the typing, I am directing your attention to the words in the fourth line from the top of the page, in different typing, "forms at completion to be property of the general contractor." Was that in when it was brought back by Mr. Hjorth, or was that added later? A. Added later.

Q. All right, skipping the next paragraph, to the paragraph following that, and reading "All

(Testimony of Sam Macri.)

materials except form wire, nails, and curing material will be furnished by the general contractor or/and owner. Sub-contractor will furnish the above wire, nails and curing material"; and the additional paragraph: "Sub-contractor will pay to the general contractor \$42.00 for power hook-up, and 90 per cent of the light and power bill, unless it is elected to make use of separate meter set-ups"; was that in when Mr. Hjorth brought it back, or was that added [1591] later?

A. Well, that was added later, when we look it over.

Q. All right, then what happened with respect to those items? Just tell the Court how those happened to be—how that change was made there.

A. Well, first he was going to furnish his own lumber, and then I agreed to furnish the lumber for him, and changed the figure in that, and also he was going to set up his own camp, and I had a camp set up, and I turned it over to him, so we added these words to it.

Q. Now, will you tell me whether or not the power hook-up was to your camp? A. Yes.

Q. And you say you agreed to turn that camp over to him? A. Yes.

Q. And tell me whether or not there was a discussion with respect to the payment of electric hook-up and power? A. Why, yes.

Q. Now, was it on that same day that these changes which I've indicated were made, or was it a later time? A. No, it was on the same day.

(Testimony of Sam Macri.)

Q. And can you tell me who made those changes? I mean who had that typing done; I mean did you have that, or did Mr. Schaefer, or how was that done?

A. Well, Mr. Schaefer and I went in together to Mr. Hjorth [1592] and he took this——

Q. May I understand, please, the contract in the original form that was typed there in the larger typewriting was prepared by Mr. Hjorth, and then the elimination of the portion I've indicated and the addition of the other in the smaller typewriting was done by Mr. Hjorth, and all on the same day, is that correct? A. Yes.

Mr. Olson: That's objected to as being leading.

Mr. Holman: It is. It is a summation, is all I was trying, your Honor.

The Court: Proceed.

Mr. Holman: May he answer?

The Court: He's already answered. Go ahead.

Mr. Holman: He said "yes."

Q. Now, was that contract signed on that day by Mr. Schaefer, or not?

A. By Mr. Schaefer and myself.

Q. Signed on that day, sir? A. Yes, sir.

Q. And can you tell me whether or not that is the date which the contract bears, which I think is indicated as the 14th of March, 1944; was that the day it was signed, do you remember?

A. Well, I can't swear now if it was on the 14th day; he took [1593] it over on that day.

(Testimony of Sam Macri.)

Q. At the time of the execution of that instrument in that form as you indicated was there any bond by Mr. Schaefer delivered to you or not, do you recall?

A. Why, yes, he delivered a bond with me.

Q. At that time, or later, Mr. Macri? Do you remember?

A. I remember he delivered a bond same day we signed.

Q. And did you look at that bond at that time? May I have Exhibit 34, Mr. Clerk? Handing you Exhibit 34, bond signed by the Glens Falls Indemnity Company, I'll ask you whether or not it was called to your attention by Mr. Schaefer or you otherwise knew that the signature of Mr. Schaefer was not on that bond?

A. No, I never noticed it.

Q. When did you first discover that Mr. Schaefer had not signed that bond?

A. Until you tell me, after you look him over.

Q. Well, when was that, about?

A. When they started this law-suit.

Q. When they started the law-suit. Now, I'll ask you whether or not before Mr. Schaefer signed the contract you had any discussion with him as to the manner of excavation for structures, as to the kind of work you were going to do, and the kind of work he was going to do?

A. You bet; I asked myself Mr. Schaefer how he wanted his [1594] excavations done, and the answer was he said "Well, you know, a small struc-

(Testimony of Sam Macri.)

ture like that, why, just give me about a foot clearance; that's all I'm interested in," so I said all right.

Q. Will you tell me whether or not at that time of signing the contract there was any discussion with respect to machinery or equipment between you and Mr. Schaefer and his brother?

A. Machinery equipment?

Q. Yes, was there any discussion about machinery, or I should say equipment, for the job, not machinery. Did you have any discussion with him about machinery—about equipment, pardon me.

A. Oh, yes, I asked him what kind of equipment he was going to take on the job. He said something about he got one of those Mixmobiles, he said, and he's going to buy a small Buggymobile. I told him "I think that Mixmobile will be too big equipment for that small structure." He said "Oh, no, that's all right." The Buggymobile, I said "You don't have to buy one, I'd be glad to help you, I got one you can use if you wish." He said "Oh, no, I think I'm going to get one."

Q. Was there any discussion between you and Mr. Schaefer with respect to you being powered sufficiently with equipment to perform the excavations ahead of his structure [1595] work? Did you have any talk on that?

A. We had plenty to shovel to do it——

The Court: Strike the answer and ask the question again.

(Testimony of Sam Macri.)

Q. What I want to know, Mr. Macri, is whether or not in your talk with Mr. Schaefer and his brother there was any discussion between you and him as to your having the equipment ability and the set-up ability to keep ahead of the unit 12, concrete excavations.

Mr. Olson: If your Honor please, I realize that counsel is having some difficulty with this witness, but it seems to me, this man has been in construction work a long time, he says, and he can sit down and relate a conversation that took place.

The Court: I'll sustain the objection to that question, as leading.

Mr. Holman: I don't intend to lead, I assure counsel. It is really difficult.

Q. Can you tell me anything else, now, Mr. Macri, in connection with the conversation you had, between Mr. Schaefer or his brother and yourself, at the time of signing this contract, as part of that transaction?

A. Yes, I told him how I'm going to do the excavation for him.

Q. What did you tell him? [1596]

A. I told him I was going to have a power machine to rough it out first, and then a hand crew and they finish by hand.

Q. Was there anything said with respect to that as between you gentlemen, any answer by Mr. Schaefer, did he give any answer, or not?

A. No, he said it was all right. Matter of fact, I asked him myself, I said "How about the sub-

(Testimony of Sam Macri.)

grade?" I told him "You know, this is all small structures." He said he prefer to have it higher, when you do it by hand just do a little higher; I realize those forms, you can get them up to a 16th, they always can be leveled off and stretch them out. I said "All right, have it any way you want it."

Q. Now when, Mr. Macri, after the signing of this contract, did you first learn that Mr. Schaefer was making any claim about the walls of the excavations not being on a slope?

A. The first time I ever heard of that slope proposition was when they started in this law-suit in your office, I never heard of no slope by Mr. Schaefer before.

Q. Did you ever have any written communication from Mr. Schaefer with respect to slopes of the excavations, before the time of commencing this law-suit? A. I never did.

Q. Now, Mr. Macri, I wish to direct your attention to Macri's identification 14, and directing your attention, Mr. [1597] Macri, to identification 14; for the purpose of the record, your Honor, the government copies of the progress and final estimates left here by the witness Pease, and including the final estimate, which for the first three pages of it has been marked as plaintiff's Exhibit 61—

The Clerk: Mr. Holman, that's all of it. Attached to there are copies that I've made to be substituted later, under the request of counsel that asked me to make copies.

(Testimony of Sam Macri.)

Mr. Holman: In other words, this is not government compilation?

The Clerk: No.

Q. All right, then, including plaintiff's Exhibit 61, will you please tell the Court how those monthly estimates and final estimates were used as between the government and you and plaintiff, and Mr. Schaefer, under the sub-contract, with respect to units performed? I don't want you to read off the items.

A. Well, this is a regular monthly estimate prepared by the Bureau of Reclamation, and different items of the work that's done each month.

Q. Well, now, just a minute; for the one that is marked estimate number 1, April, 1944, when would you currently receive that estimate; in the month of April, or would it be in the month of April? [1598]

A. No, that's work done in the month of March, and we receive in April.

Q. About what time of the month?

A. On the 20th, each month.

Q. Now, then, Mr. Macri, that would be so, would it, for about the 20th, of each month, of the various estimates that are indicated through there, numbered 2 right on through including 12?

A. Well, I want to make sure about it; I'm not sure. It is the 20th or the 25th, but that's close.

Q. Now, estimate number 1, as an item 7, can you answer me this, Mr. Macri: Are the items numbered 1 through 28 in the first column the same

(Testimony of Sam Macri.)

units as the items numbered 1 through 28 on pages 3 to 5 of Exhibit 3? A. Yes, they are.

Q. All right. Then just for clarification, your Honor, item 1, while not designated as "Excavation common for laterals" means that in reality, but you know what they are by reference to this?

A. Yes.

Q. All right, sir. With reference to item 7 for the month of April, 1944, estimate number 1, did you receive the compensation as shown by that estimate of \$1,892.93 net? A. Yes, we did.

Q. And turning, then, to the same item 7——

A. Item 7, that's structure excavation——

Q. ——for the month of May likewise?

A. Yes.

Mr. Olson: Now, if your Honor please, if what counsel is intending to do is go through each of these estimates to show how much Mr. Macri was paid for the common excavation, we object to it as being wholly immaterial, proves nothing as far as any controversy between Schaefer and Macri is concerned.

Mr. Holman: That's not my purpose. I assure counsel it is not my purpose.

The Court: Is this on the excavation, by way of illustration?

Mr. Holman: Yes, and I'm trying to the place where 8 shows too. Number 7 shows only, on number 3 for the month of June.

Mr. Olson: If that isn't counsel's purpose, then I object to it. I don't see where it is material.

(Testimony of Sam Macri.)

Mr. Holman: All right, I'll present this question, and I would really appreciate presenting my case without too much interference, if it is within reason.

Direct Examination
(Continued)

By Mr. Holman:

Q. Did you receive copies of each of the estimates, number 1 to and including number 12, for the month of March, 1945, with respect to this specification 1062, schedule 1? [1600]

A. Yes.

Q. And did you receive those currently each month with a check for the amount as indicated there, in due course, from the government?

Mr. Olson: That's objected to as being immaterial, whether he received the money or didn't.

Mr. Holman: I submit it is material, because the very next question is whether or not Mr. Schaefer was paid by Mr. Macri.

Mr. Olson: That's something else; whether or not the government has paid him is wholly immaterial.

The Court: There's a provision in the contract that payments were to be made to Mr. Schaefer as they were made by the government.

Mr. Holman: Yes, that's exactly the point.

The Court: Overruled. I presume, nevertheless, that wouldn't apply to the items covered by the sub-contract; you're not making any contention

(Testimony of Sam Macri.)

Macri can hold up payments to Schaefer because he didn't get payments on the excavation?

Mr. Holman: Oh, no.

The Court: All right, go ahead.

Mr. Holman: That was my purpose in directing attention to the first of these items that did not have item 12 in, or any related items. [1601]

(Whereupon, the reporter read the last previous question.)

A. Yes.

Q. Will you tell me whether or not currently as you received compensation for any of the items, 12, concrete structure, 13, placing reinforcement bars, 15, erecting timber in structures, or 16, installing gates and miscellaneous metal work, you currently transmitted to Mr. Schaefer payment under his sub-contract for the items shown performed thereby?

Mr. Olson: The question is objected to as being leading.

The Court: It is leading.

Mr. Holman: I'll withdraw it, your Honor. I call upon counsel to produce under our demand the copies of the statements for the checks transmitted to Mr. Schaefer for performance under his sub-contract. I have a written demand in for it. I would like to have it at this time.

Mr. Olson: Well, the checks I assume have been returned to Mr. Macri.

Mr. Holman: The part I'm asking for is the portion that shows the payment of those checks.

(Testimony of Sam Macri.)

The Court: You'll have a reasonable time to produce that, a demand made at this time. You can wait until the night recess. [1602]

Mr. Holman: I have made a written demand, your Honor.

The Court: Oh, I see. I thought you were making a demand at this time.

Mr. Olson: I guess it wasn't a notice to produce, but it was referred to in the deposition, and I have them available. I even have some that you didn't have in there, Mr. Holman.

Mr. Holman: Well, off the record, I am grateful.

The Court: I appreciate the difficulty in carrying on an examination without leading a little, but you were very strict in your objections, and I feel I must rule the same on both sides.

Mr. Holman: Your Honor, I appreciate your ruling that way, and I hoped I would reach the point where I wouldn't lead, but it is hard to do. May I have these marked for identification, Mr. Clerk, as one exhibit and sub-numbers, including the envelopes attached?

(Whereupon, voucher part of checks, Macri to Schaefer, were marked defendant Macri's Exhibit No. 76 for identification.)

Direct Examination
(Continued)

By Mr. Holman:

Q. Handing you what has been marked Macri's identification 76, I'll ask you whether or not you

(Testimony of Sam Macri.)

recognize the yellow portions there as coming from your office, and the [1603] envelopes attached as coming from your office? A. Yes.

Q. Now, what is that yellow portion, Mr. Macri, those yellow sheets, what are they?

A. Well, this is the monthly estimate; when we received from the government we usually paid to the contractor that proportion.

Mr. Olson: I move that be stricken as not being responsive.

(Whereupon, the reporter read the last previous question and answer.)

The Court: Well, I think that is a general explanation. I'll let it stand.

Q. What I'm primarily interested in, Mr. Macri, whether that yellow is all you send, or if it is part of something else.

A. Well, some of those we mark either on the checks, sometimes the bookkeeper sends a regular statement along.

Mr. Holman: I move that be stricken as not responsive.

The Court: It will be stricken.

Q. Are those yellow sheets detached from a check, or do they accompany a check, or are they sent that way, without a check?

A. Oh, no, a check goes along with this. [1604]

Q. Attached to it, or part of it?

A. Yes, attached to it; it's one check.

Q. Is this the voucher part of the check?

A. Yes, and we've got the cancelled check ourselves.

(Testimony of Sam Macri.)

Mr. Holman: I offer identification 76 in evidence, your Honor, for the purpose of illustration of the manner of compensation between Macri and Company and M. C. Schaefer under sub-contract 1062, assuring the Court that I will have the complete accounting as part of my case in chief. This is merely for the purpose of showing the manner of transmittal.

Mr. Olson: I wish to object to their admission, your Honor. It is not complete. The witness' testimony shows it is only part of the transmittal. I think if they're going to offer them in evidence they should put in evidence the whole part of the transmittal, not just part of it.

Mr. Holman: I limited my offer, your Honor, not to proof as to amounts, but as to the means; that's all I'm offering them for.

The Court: I'll admit them for the purpose indicate, to illustrate the method of payment.

(Whereupon, defendant Macri's Exhibit No. 76 for identification was admitted in evidence.)

Mr. Holman: Your Honor, Mr. Olson now has his copy [1605] of the deposition, and if your Honor would permit, I would like to present that.

The Court: I think Mr. Olson said he wanted to look it over before it is read, and I don't suppose he's had an opportunity to do that.

Mr. Olson: I haven't even opened it yet. It was brought in here a few minutes ago.

Mr. Holman: I'm sorry.

(Testimony of Sam Macri.)

Direct Examination

(Continued)

By Mr. Holman:

Q. Mr. Macri, will you tell me, please, after the signing of the sub-contract for specification 1062, schedule 1, whether or not you visited that work? A. I did.

Q. About how often would you visit, Mr. Macri, go on the work?

A. Oh, when we began the work I was over there for a considerable time, but after that I used to make a run practically once a week.

Q. I'll ask you when, if you recall, you first met either Mr. M. C. Schaefer or Mr. William Schaefer on the job? Do you recall the time?

A. Yes, during the month of April I saw Mr. William Schaefer.

Q. Month of April; and specifically with respect to the date of April 29, 1944, can you tell me whether it was before or after that, or on that date?

A. No, that was before then.

Q. It was before that? A. Yes.

Q. About what time, Mr. Macri? Do you recall?

A. Oh, I judge it was during about the 20th of April, somewhere about that neighborhood.

Q. About the 20th, you say? A. Yes.

Q. In advance of that, had there been any communication to you about the manner of performance of the structure excavation? A. No.

(Testimony of Sam Macri.)

Q. When and where did you first meet either Mr. M. C. or Mr. William Schaefer, do you recall?

A. Well, I met Mr. William Schaefer on the job first, which was him and Mr. Waltie, and he introduced him to me, he say he was his superintendent or his foreman, and he had to get over in the field, and that was in the beginning, when they start to set some structures in the field, and I talked to him and asked him how he get along, and Mr. William say "Well, this kind of stuff is new to us; we'll be all right in a couple of weeks; we try to break ourselves in." I says "All right, if there is anything I can do let me know," and he says "All right, I'll let you know." [1607]

Q. That was William Schaefer?

A. That's William Schaefer, yes.

Mr. Holman: And in that connection, your Honor, I wish to direct the Court's attention to Macri's Exhibit 13A and 13B and 13C, the report of the inspector, J. S. Hears, the concrete inspector J. S. Hears. I understood, your Honor, that the preference was that these not be read into the record, but they be admitted as exhibits. They have been admitted as exhibits.

The Court: Well, it isn't necessary to read them into the record, but if you want to call my attention to them, I had better see them.

Q. Now, is that the first time after the signing of the sub-contract with Mr. Schaefer that you had any meeting upon the job with either Mr. Schaefer, either M. C. Schaefer or Mr. William Schaefer? Is that the first one?

(Testimony of Sam Macri.)

A. First time I was Mr. William Schaefer, yes.

Q. Well, had you seen Mr. M. C. Schaefer there before that? A. No.

Q. And when next, if you recall, did you see either Mr. M. C. Schaefer or Mr. William Schaefer?

A. That was a short time after that; they say April 29. It might be April 29. I can't swear myself about it.

The Court: I didn't get that.

(Whereupon, the reporter read the last previous question and answer.) [1608]

Q. And will you tell me whether or not there had been in advance of seeing either of those gentlemen at that time any appointment made with you to see them?

A. No, sir, they never had no appointment made with me.

Q. And will you tell me whether or not your superintendent made any appointment with you to meet them at that time?

A. No; I went on the job over there and I been told Mr. Schaefer is on the job and was looking for me.

Q. Where did you go on to the job from? Where were you?

A. Well, first I went in the office there. We had an office over there in the camp.

Q. Yes.

A. And they told me Mr. Schaefer was on the job, and they wanted to see me, so I said "Why?"

(Testimony of Sam Macri.)

Q. Do you remember who told you?

A. Yes, a guy in the yard over there, one of the carpenters.

Q. And where did you meet either of these gentlemen on that day?

A. I met them over there by the first lateral, that's 59.3, I think it was; it wasn't very far from the office there, so I drove the car and I met them over there, Mr. Schaefer and his assistant, and also I sent for Mr. Staples, my superintendent; I sent a truck driver to go and get him, because he was in the field to help do some structure [1609] digging.

Q. Do you recall who was at this meeting where you saw Mr. Schaefer?

A. Well, I saw Mr. Schaefer and his brother was over there.

Q. Yes.

A. And I think one of his foremen, his carpenter foreman was there, and I heard his name was Waltie, it probably was Waltie, and that's about all I seen over there.

Q. Now, where did you meet them, Mr. Macri?

A. Well, it was about the road over there in the first lateral, and I noticed they mention that structure 18, probably is structure 18, which that was dug wrong, the shovel had dug a little too deep on one side, and that's one they pointed me out about this structure, they say "Look at this structure here, it's not dug right." I say, "I can see

(Testimony of Sam Macri.)

that, all right; we're going to fix for you." That's the reason I called Mr. Staples, "Get your men now, we're going to fix up this structure, and from now be very careful and see that it is done right." That's about all that was said then.

Q. Now, I'll ask you whether or not at that time you told Mr. M. C. Schaefer that he was to do two-tenths or three-tenths of the excavation himself? A. Did not.

Q. Sir? [1610] A. I did not.

Q. And I'll ask you whether or not at that time and in that meeting Mr. Schaefer made a statement in substance to you—that you made a statement in substance to Mr. Schaefer as follows: "I will pay you for all of the extras, just get going"?

A. I did not.

Q. I'll ask you whether or not at that time Mr. M. C. Schaefer answered in substance this: "I said"—referring to him, "you're going to pay for all of the expenses; I am never going to be stymied again." Was there any statement like that, Mr. Macri, or not?

A. He never told me such things.

Q. I now ask you whether or not you replied in substance "That's it"? A. No, sir.

The Court: We'll take a ten minute recess.

(Short recess.)

(Testimony of Sam Macri.)

(All parties present as before, and the trial was resumed.)

Direct Examination

(Continued)

By Mr. Holman:

(Whereupon, the reporter read the last previous question and answer.)

Q. And directing your attention to the statement of the witness Waltie at the meeting, at which he stated Mr. [1611] Staples, Mr. Macri, Mr. William Schaefer, Mr. M. C. Schaefer, and himself were present, on April 29, 1944, and I'll ask you whether or not you made the following statements at that time, or any of them—— A. Did not.

Q. Just a minute; I'll ask you whether or not this occurred: "Mr. Schaefer told Macri that he was not going to do any fine grading." Was there any such statement made at that time?

A. Fine grading?

Q. By Mr. Schaefer, to you.

A. Well, they point out to me that the structure wasn't dug right, on the 29th.

Mr. Olson: I move that be stricken.

The Court: It will be stricken.

Q. I want you to answer yes or no. I asked this witness the time and place and who was present, and I've indicated that to you. Now I want to know whether or not at that time Mr. Schaefer told

(Testimony of Sam Macri.)

you he was not going to do any fine grading. The answer will be yes or no.

A. I don't quite get that question now.

Q. Mr. Waltie has testified on the stand that on April 29 at the meeting between you, Mr. M. C. Schaefer, Mr. William E. Schaefer, Mr. Staples, and yourself, Mr. M. C. Schaefer made the statement that he was not going to do [1612] any fine grading. Now, was that statement made or not, within your presence and hearing?

A. There was no statement by Mr. Schaefer about the fine grade.

The Court: I didn't get that.

(Whereupon, the reporter read the last previous answer.)

Q. Now, I'll ask you whether or not at that time you said to Mr. Schaefer in substance this: "Not to worry about costs, I will pay for that"; that Schaefer said it was not only the time lost, but it was the time held up, and that you said to Mr. Schaefer, that's M. C. Schaefer I'm talking about, "I will see that the job goes ahead so there will be no more waiting and no more digging." Now, did you make that statement, or did Mr. Schaefer make that statement?

A. I did not.

Q. Sir? A. I did not.

Q. And did Mr. Schaefer make that statement to you, the statement of Mr. Schaefer being that it wasn't only the time lost, but it was the time held up?

A. Never made such statement.

(Testimony of Sam Macri.)

Q. Now, I'm directing your attention to the testimony of the witness William E. Schaefer, and I'm reading, your Honor, [1613] from the transcription as furnished me by Mr. Taylor at my request, as follows; if you listen, now, I'm reading this transcribed testimony to you, and I want to question you, Mr. Macri:

“Question (by Mr. Olson, it would be on direct examination): All right, now, what did you do and what was said in Mr. Macri's presence and in Mr. Staples' presence?

Answer: We complained about the excavations.

Question: What did you say about them?

Answer: They were all dug vertical, none of them room enough to put in our forms, she-bolts, or strong-backs, and the excavation wasn't any part of the Concrete Construction's contract, we wasn't to have anything to do with the excavating. Well, Mr. Macri said the boys made a mistake, and that we'll make them bigger.

Question: What did he say about the slope, if any, of the banks?

Answer: Well, he said they'd excavate them to a slope so we could get the forms in and out, and my brother mentioned to him that it was—it cost a lot of money to do that excavating, and it wasn't any part of our work, and he said ‘Why don't you take over the excavating,

(Testimony of Sam Macri.)

the fine grading?'; brother says 'I don't want anything to do with it'; he says, 'You take it and I'll pay for it'; brother says 'No, that's none of our work, [1614] and I don't want it; we've spent too much money on this now, trying to get started' he says, 'If this keeps up, we tear these forms out, they'll have to go back to the shop and repair them, they'll wreck them when they take them out, otherwise we could take these panels to another structure without hauling them to the yard and hauling them back,' and he says 'Don't worry about that, I'll pay all your costs and expenses on that job; let's get it started and quit arguing about it.'

Question: Is that the substance of the conversation as you remember it?

Answer: Yes.

Question: Now, about how many excavations, or structures, I should say, did you check?

Answer: At that time?

Question: Yes.

Answer: I believe three or four.

Question: This was on the 29th of April?

Answer: The 29th of April.

Question: All right, now, did you find anybody doing any hand excavation on any of those structures?

Answer: That same day, on structure 18, next to the road, Fred Waltie and George

(Testimony of Sam Macri.)

Schuler were excavating, and M. C. Schaefer pulled them off the excavation. He says 'We're doing too much of this now.' [1615]

Question: Were any of Macri's men there doing any excavation?

Answer: I didn't see any.

Mr. Holman: Pardon me, who?

Answer: George Schuler.

Question: Whose employee was George Schuler?

Answer: They were Concrete Construction employees.

Question: Did Mr. Macri say anything to Mr. Schaefer that day in your presence as to the amount of money Concrete Construction Company would make on this job?

Answer: Yes, he did. He made the remark that nobody ever lost any money.

An objection by Mr. Hawkins, an objection by Mr. Holman, and the Court overruled, and said he may answer, then Mr. William E. Schaefer continuing his answer:

Answer (Continued): He said nobody ever lost any money on Macri's job, and he wasn't either, that we should make between eleven and twelve thousand dollars on this job."

Q. Mr. Macri, I want to ask you whether any of those statements which were attributed or shown

(Testimony of Sam Macri.)

as having been made by you were made by you at that time and place?

A. No, sir, none of those statements.

Q. Sir?

A. None of those statements ever been made by me.

Q. And I want to ask you whether or not any of those statements [1616] which are shown by this that I read to you as having been made by M. C. Schaefer was made to you at that time or place?

A. No, sir.

Q. Now, will you tell me to the best of your recollection what was the conversation between M. C. Schaefer or William E. Schaefer and yourself, or with Mr. Waltie, or in the presence of any one of those three, the very best you recall?

A. The true words that they were saying that day, I met Mr. M. C. Schaefer on the job, I only talked with M. C. Schaefer, and of course his brother was over there, and his superintendent was a little ways over there, but M. C. Schaefer and myself did the talking, and all he point out to me that the structure, which I admit that structure was over-dug, over there, we was willing to fix for him, and also he pointed out another little structure over there, which he had his foreman, he said "See here, now, this little structure," which was a little square box which was about half up above the ground, only about a foot and a half deep where the form went down, he said "This here was a little too snug, a little too tight." I said "Well,

(Testimony of Sam Macri.)

you got the form in, it's all right to just go ahead and pour." He says "Yes, but pulling the form out"; there's a rock there, all you got to do is use a [1617] little force on the side. He said "Oh, yes, that's minor." Now, that's all that was said that day. There was no hard feeling, argument, or anything else.

Q. Did you make any statement to Mr. M. C. Schaefer or William Schaefer or Mr. Waltie or Staples or any of them as to making any payment of any kind? A. I did not.

Q. Sir? A. I did not; not that day.

Q. I'll ask you whether or not at that time or any time after that there was any bill or statement of any kind for any digging by the Concrete Construction Company sent to you or received by you or delivered to you?

A. No, never no bills.

Q. Now, turning to the matter of lumber, can you tell me in general terms approximately the amount of lumber furnished the job, or do you recall?

A. Yes, all total lumber been delivered on 1062, the records we have, that's in the neighborhood of about 120,000 feet of lumber, besides the plywood.

Q. Mr. Macri, I'll ask you whether or not you were present at any time when there were any measurements of structures, excavations, made in your presence?

A. Yes, I was down first part of June.

(Testimony of Sam Macri.)

Q. First part of June, would that be 1944?

A. '44, yes.

Q. Did you make any memorandum at that time, Mr. Macri, do you recall?

A. Yes, I did make a memo, piece of paper.

Q. When and by whom were those measurements made?

A. By a fellow by the name of Mr. Klugg, who was Concrete Construction carpenter foreman.

Q. Now tell the Court, was either Mr. M. C. Schaefer or Mr. William Schaefer or Mr. Waltie or any other representative of the Concrete Construction Company present at that time?

A. Just Mr. Mercelle and Mr. Klugg and myself.

Q. Mercelle, that's the witness Mercelle who testified here?

A. Yes.

Q. And Mr. Klugg and yourself?

A. Yes.

Q. Tell the Court what was done at that time, will you, please?

A. Well, I asked Mr. Klugg why this Concrete Construction don't start to pour concrete, they got so many holes ahead and everything, and some windstorms and everything, we'll have to do everything over, just be a waste of time and expense. He said "I don't know." I said "Let's make sure, now, because I want to call Mr. Schaefer; you're their man, you understand all about it, [1619] we'll measure to see if everything's perfect," and it was all set, so he said "All right." He got hold of Mr. Mercelle, I thought he was truck driver but he said

(Testimony of Sam Macri.)

on the witness stand he was a carpenter foreman, so Mr. Mercelle drive his own truck, and Mr. Klugg and I went, and Mr. Klugg had his book, and he started one by one, and him and Mr. Mercelle did the measuring, of course; I just watch all that, and he don't find nothing wrong, and I asked him if he mind if I marked once in a while, 1, 2, 3, 4, as we went along, and we went about as far as a piece of 75, and he only find on one corner a quarter of an inch off on two of those structures. He say "That don't amount to anything"; I said "We can have that done." That's all he find, two out of 75. I said "Shall we go ahead?" He said, "No, let's go home, it's quite a time; I'm pretty sure that's all right," and we went.

(Whereupon, memo made by Macri was marked defendant Macri's Exhibit No. 77 for identification.)

Q. Handing you what has been marked Macri's identification 77, I'll ask you whether or not the figures above the portion where it is marked had anything to do with that at that time?

A. No, this is a notation what he gave to me on 1068, Mr. Schaefer. [1620]

Q. Then with reference to the figures on the reverse side, the opposite from which Macri's 77 has been indorsed, will you tell me whether or not those are the notations you made at that time?

A. Yes, that's notations what I made.

(Testimony of Sam Macri.)

Q. Will you tell me whether or not that is the paper about which counsel interrogated you, asked you at the time of his taking your deposition, and you said you would get it if possible?

A. Yes.

Mr. Holman: I would like to detach this portion that the witness has shown as not pertaining to this meeting, your Honor, and offer the rest in evidence, or leave it on, I don't care, but it will have to be referred to in respect to 1068; it probably had better be detached.

The Court: Well, you can detach it. Any objection to that, Mr. Olson?

Mr. Olson: I suggest your Honor take a look at that. It certainly is a self-serving notation, and it is meaningless, at best, if you can read it. It says "1 O.K." and "2 O.K.," or something like that. It doesn't mean anything. It is his conclusion.

Mr. Holman: I'll hold the offer until I identify that, your Honor. I was concerned about separating the [1621] two parts. If you would give that other another exhibit number, Mr. Clerk, I'll use it later.

(Whereupon, memo of figures submitted by Schaefer to Macri on 1068 was marked defendant Macri's Exhibit No. 78 for identification.)

(Testimony of Sam Macri.)

Direct Examination

(Continued)

By Mr. Holman:

Q. Now, calling your attention to Macri's Identification 77, will you tell me, please, what these numbers indicate, whether they indicate a structure number or the number of structures that you checked; what do they indicate?

Mr. Olson: I object to that question as being leading and suggestive. an improper question, and I ask that the witness be now precluded from answering that question.

The Court: Well, the objection is sustained, as leading.

Q. Tell the Court what those numbers do indicate or represent.

A. Well, we went along on the job, like it says, "2 O.K."; he measured two of those structures, and then we went along and there was seven O.K., and I marked "7 O.K."; and I say "2 low on the one corner"; they were a little low; out of all this trouble here we find two a little low.

Mr. Olson: I ask that answer be stricken as not responsive. The question was what they meant and indicated. [1622] He said we went along and found them all right, and I put O.K.

The Court: Motion denied.

Q. And can you tell from that, Mr. Macri, the total number that were inspected?

A. Yes, we inspect altogether about 27; no, 26.

(Testimony of Sam Macri.)

Q. 26 structures?

A. 26 places. Some places two or three structures on one place.

Q. 26. All right. Now, will you explain to me how identification 78 happened to be part of that same paper?

A. Yes, it was a paper I had in my pocket. That's the same portion.

Mr. Holman: I now offer in evidence Macri's identification 77, your Honor, a copy of which, the best we were able to give, has been furnished counsel by letter on February 12.

Mr. Olson: We object to the introduction, your Honor, on the ground that it is meaningless in the first place, and states merely this man's conclusion; there's not any testimony as to any fact, and that it is purely a self-serving document, prepared by this witness.

The Court: On what basis is this offered, Mr. Holman?

Mr. Holman: Offered as evidence in view of the [1623] fact that counsel in the deposition asked specifically that it be produced here, your Honor, and we're complying with counsel's' request, otherwise it wouldn't be offered.

The Court: Well, the request for production of a document doesn't bind counsel to let it be admitted.

Mr. Holman: No, your Honor, but we were obligated to produce it under our undertaking with counsel, and I have done so.

(Testimony of Sam Macri.)

The Court: Sustain the objection. I think it is all right for him to have used it to refresh his memory, but it is not a part of his books or records.

Direct Examination

(Continued)

By Mr. Holman:

Q. Mr. Macri, at the time of your being present in the field with Mr. Klugg and Mr. Mercelle, can you tell me what was the size, if you remember, of the crew of the Concrete Construction Company? What had happened there, do you recall?

A. Well, all the whole crew I recall they had was Mr. Klugg and Mr. Mercelle, and one man, I don't recall his name; they had three men.

Q. As as a result of that meeting did you then communicate with Mr. Schaefer at all, Mr. M. C. Schaefer? did you talk or anything with Mr. Schaefer?

A. Yes. I got in touch with Mr. Schaefer by telephone.

Q. Where from, the job, or from Seattle, do you recall? [1624]

A. I gave him a ring from my office in Sunnyside and I asked him why he don't come in to pour concrete, we got so many holes ahead, and they would be spoiled if he didn't go ahead, and some of his forms would be spoiled, leaving in the hole, so I told him I don't care about the lumber, but there's no sense wasting the forms, labor, and everything

(Testimony of Sam Maeri.)

else. He says "I've been told by my people that everything's wrong." I told him to come over himself so we can prove the fact, the truth. He says "Yes, I'll come over, and I'm going to bring my bond man along." I says "that's all right with me; if that the case I better bring an engineer to solve all this stuff; your men tell you they're not right, my men tell me they're right, you don't come yourself." He said "All right, I'll be over there and bring my bond man." I said "I'll bring an engineer along, we settle everything once for all," so we made an appointment and we met over there and I bring an engineer along, and he had his bond man.

Q. Who was the engineer you brought?

A. L. Cohen.

Q. And who was the bond man he brought?

A. It was that gentleman here, I forgot his name, he testified that day.

Q. We agree it is Mr. Hunter. [1625]

A. Mr. Hunter, I guess it was. Well, we went on the job——

Q. Now, just a minute, Mr. Maeri. I do not want to get those matters unresponsive. Did you meet Mr. Schaefer and Mr. Hunter?

A. Yes, we meet that morning.

Q. Which Schaefer was that?

A. M. C. Schaefer.

Q. Mr. M. C. Schaefer; and who else was present, if you recall, of the Concrete Construction crew other than Mr Schaefer?

(Testimony of Sam Macri.)

A. I think Mr. Waltie was over; he was the only one he had, the first man that he had on the job.

Q. Now, I want to ask you with respect to that meeting, Mr. Macri, where was that meeting, at the job office, or in the field, or where?

A. On the field.

Q. How did you happen to contact them? Did you go out into the field with them, or were they out there, or what? Just tell the Court how you happened to meet with them, if you remember.

A. I'm positive now where I meet them; I know the meeting took place over there in the field.

The Court: Did you understand the question, Mr. Macri, how you happened to meet them?

A. Yes, I tried to think if I met them first in the office [1626] and then in the field; my mind isn't clear on that. Now, we had a meeting in the field all right, but whether we meet over there, or first in the office, my mind isn't fresh on that, and I don't like to swear anything I'm not sure about.

Q. Did you make any statement in the hearing and presence, to Mr. M. C. Schaefer, in the hearing and presence of Mr. Waltie and Mr. Hunter and Mr. Cohen, do you know? Did you make any statements about this job then, in their presence?

A. Was any statement made?

Q. Well, were you all together, or were you separated, or how; was there a meeting there, or were you along the line, or what?

(Testimony of Sam Macri.)

A. First, when we went on the job,—am I allowed to explain to the Court the way it was happened?

Q. Yes, I would like to have you explain how you went on the job, yes, sir.

A. All right. When we went on the job Mr. Schaefer and Mr. Cohen, my engineer, they spoke together among themselves. Now, this bond man and myself, we was a little ways. I asked him, I say "What's the purpose of their bringing you here." He say "I don't know; he told me to come along so I did." That's all right. So then Mr. M. C. Schaefer he spoke out and he said "Here, this is done wrong." Well, [1627] I say "All right, if it's done wrong we'll fix it." He said "Yes, but one of my men, I've been told he put up two hours worth of work, and it was not his job to do it." I told him "Mr Schaefer, if your man put up two hours, and it's our mistake, send us a bill, and even if it is \$10.00 I'll send you a check for it." He said "Well, I don't care to do that." The bond man said "Macri, you know some of those sub-contractors, they always got some squawk coming," and I said "I understand that all right, but this was a small matter anyhow." I told him "This is an essential job, we're in a war here, and we should go ahead and finish this job." He says "Yes, I'm going to talk to Mr. Schaefer, and everything's going to be all right." He said "I don't see nothing to squawk about; even the minor stuff, there's only two or three of those," so after that I never heard

(Testimony of Sam Macri.)

that testimony, say "You're going to pay," different times. That never existed, such a words.

Q. Now, I want to ask you specifically with respect to the testimony of Mr. Waltie at that time and place. This is Mr. Waltie testifying now. I want to ask you whether or not this is correct and occurred in your presence or hearing: "Schaefer was insisting that he didn't want to go on as the job was being done, that the costs were very high and he hadn't got anything done, and Macri said he [1628] didn't have to worry about the cost, that they would have an engineer on the job Monday to see that things were done proper. Macri said two tenths or three tenths was nothing to be concerned about, and Schaefer said anything but absolutely fine grade was Macri's responsibility. Schaefer said he wanted nothing to do with it, and Macri wanted Schaefer to take over the fine grading." Just a minute, now. I'll ask you whether or not that conversation occurred in your presence or hearing?

A. Never in my presence there hasn't been that.

Q. And directing your attention, Mr. Macri, to a portion of the testimony of the witness Allyn R. Hunter as transcribed by Mr. Stanley D. Taylor, the court reporter: "Question: Now, Mr. Hunter, will you go ahead and tell what took place, what was said, in Mr. Macri's presence? Answer: Mr. Macri, Mr. Cohen, Mr. Schaefer, Fred Waltie and myself went out on the project to look over some of the project, and Mr. Schaefer and Mr. Macri started arguing right off the bat as to the structure excavations,

(Testimony of Sam Macri.)

so we drove out in our car; I couldn't give you the exact location, however, Mr. Waltie had a layout plan with him which I suggested he bring along. We went out and looked at maybe four or five structures that were in, and on both occasions Mr. Macri and Mr. Schaefer were arguing about how tight they were, and there wasn't room [1629] in my opinion to put in the forms properly." And there was a ruling there, and an objection, your Honor, to that last statement, then the answer continues: "We walked on up and looked over several of the holes which had been dug, evidently by a hoe, and I would say that we looked at four or five holes, over a matter of a half mile walking, or something like that. They were roughly excavated, and I got down in the hole with Mr. Waltie and measured up the approximate yardage in the hole, the distance out, and the length of it. Question: What did you find? Answer: And these holes were not long enough, they were not wide enough, for structures. As to their elevations in the bottom, there had been no work done, just the hoe teeth showed in there, and the soil was of such a nature that it could be excavated much wider to get your forms in properly. Question: Were there on that day, or did you on that day check any excavations that the fine grading had been done in, or were there any? Answer: Not as to the elevation in the bottom of the holes, no. I had no level or anything there to check the exact fine grading in the bottom of the holes, which would require an in-

(Testimony of Sam Macri.)

strument. Question: Did you check any of the excavations for alignment? Answer: Just from the hubs, yes. Question: What did you find in that regard? Answer: Well, I would say that it was a typical [1630] excavation of a hoe, without any hand work being done on the structure excavation.” Now, particularly to this, Mr. Macri: “Question: Now, did any conversation ensue there, Mr. Hunter, in Mr. Macri’s presence? Answer: Mr. Macri requested Mr. Schafer to take over the fine grading, and Mr. Schaefer said ‘I will not have anything to do with the fined grading,’ and argument *pursued*; finally Mr. Schaefer told him that as soon as he got the fine grading on the button, that he would start out and put in his structures, his forms, and pour his structures, and keep going, but he had to have enough of this ahead to keep him going, and Mr. Schaefer was very, very definite as to the structure excavation at that time being on the button. Question: I’d just like to interrupt here; was there any work going on on the project at the time? Answer: Not to my knowledge, there was nothing going on. Question: Then proceed with the conversation. Answer: So Mr. Macri said “Well, if you will get your men down in the holes and take care of this additional work, I will pay you for it” and Mr. Schaefer said ‘I’ll not do any of that work; that is not my job’ and at that time Mr. Macri spoke up and said ‘If you will do any of this additional work here that necessitates any extra expense or cost to you I’ll

(Testimony of Sam Macri.)

pay for it'." Then objections, and your Honor's ruling, and continuing: "Answer: At that time Mr. Schaefer [1631] spoke up and said "I have not received any compensation for any extra work I have done on these holes up to date; I don't see where I can receive any from here on out, therefore I do not want anything to do with the structural excavation and fine grading" so we then left this particular area and started back in the car, or walking back to the car, and Mr. Macri and I were talking together, in the presence of the other men, and Mr. Macri said 'I will have Mr. Cohen on here the first of this next week to take over, and we'll see that this excavation is done properly'; and Mr. Cohen said that if he come out to handle that work, he would see that it was done properly. Mr. Schaefer said 'Well, it remains to be seen what will happen between now and the first of next week'."

Then an additional statement that Mr. Taylor did not type, but I get from my own notes, Mr. Macri said "I will take care of any costs in regard to fine grading, additional expenses on forms, or additional expenses to you, Schaefer; that no man has lost any money on Mr. Macri's jobs, and you are no exception."

Now, will you please tell me whether or not those conversations which I have detailed to you from this transcribed testimony, and the last one I gave you, occurred in your presence or hearing?

A. I never make such statement. [1632]

(Testimony of Sam Macri.)

Q. Was any such statements made by you or to you by Mr. Schaefer, as indicated there?

A. Not in my presence.

Q. And did you make any such statement in the presence of Mr. Hunter as the last one I read you "I will take care of any costs in regard to fine grading, additional expenses on forms, or additional expenses to you, Schaefer; that no man has lost any money on Mr. Macri's jobs, and you are no exception"; did you make that statement, or not?

A. No, sir, the only statement I made, as I said a minute ago, he said one of his men spent two or three hours on some work that don't belong to him. I said "Even if that's \$10.00, mail me a bill and I'll mail you a check for it," so he never sent me a bill, and I never mailed him a check for it, and that's the true words that we said over there.

Q. Mr. Macri, at that time was there any statement made by Mr. Schaefer to you that he would increase his crew and complete the performance of the sub-contract? Did Mr. Schaefer make any such statement to you?

Mr. Olson: That question is objected to as being leading again, your Honor.

Mr. Holman: Well, I'll withdraw it. I don't mean to be leading. [1633]

Q. When next did you see or know of Mr. Schaefer being on that job?

A. Well, after that meeting took place I only saw Mr. Schaefer once on the job, and that was I

(Testimony of Sam Macri.)

stopped in the office and he wouldn't talk to me, and I never saw him no more. That's the only time I ever talked with Mr. Schaefer as far as the job was concerned.

Q. Where was Mr. Schaefer and where was you when you last saw him on the job?

A. I was in the office and he was in the car. He just went straight through and never stopped there.

Q. Now, did you at any time after that see Mr. Schaefer on the job to talk to him?

A. No, I never talked to him at all after that.

Q. And again after that, did you again have any talk with Mr. William E. Schaefer?

A. No, sir, I never met Mr. William E. Schaefer after that meeting.

Q. These typewritten court reporter records which I have read into the record I have previously given you and asked you to read, had I not, Mr. Macri, and you had read them?

A. Some I did, yes.

Q. Yes. I'm looking for one additional statement, your Honor. [1634]

The Court: Yes, all right.

Q. And I don't seem to locate it easily. I'll ask you whether or not you made any statement to Mr. Staples, George Staples, that you had told him that regardless what you said to Schaefer to go ahead and do as he had been doing; did you make any such statement?

(Testimony of Sam Macri.)

A. The only statement I made with Mr. Staples, to go ahead and do the job as best you have done, and not give those people a chance to complain.

Mr. Olson: I ask that be stricken as not responsive.

The Court: It will be stricken.

Q. Now, will you please tell the Court what instructions you gave Mr. Staples after this meeting with Mr. Schaefer? I'm asking for the same answer, your Honor.

Mr. Olson: I'm objecting to any instructions he gave Mr. Staples, as being immaterial.

The Court: Is it supposed to be in the presence of any of the other parties?

Mr. Holman: No, your Honor. I was looking for some one of the witness' statements, who made the statement that Mr. Staples had told him that he had instructions to do the work. I just can't locate the statement right now, your Honor, so I'll withdraw that question.

The Court: We may as well suspend at this time. [1635] This case will be resumed at 10 o'clock tomorrow morning.

(Whereupon, the Court took a recess in this cause until Thursday, March 13, 1947, at 10 o'clock a.m.)

Yakima, Washington, Thursday, March 13, 1947
10 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, may I suspend the examination of Mr. Macri and present this deposition here?

The Court: Yes.

“Deposition of Harold T. Nelson

“Be It Remembered that on this 8th day of March, 1947, at the Bureau of Reclamation office near Boise, in Ada County, State of Idaho, at 1:30 p.m., the deposition of Harold T. Nelson, a witness on behalf of the defendants Macri, was taken pursuant to the attached Notice.

“Appearances: Harry L. Olson, Attorney-at-Law, of Yakima, Washington, counsel for the use plaintiff.

“Tom W. Holman, Attorney-at-Law, of the firm of Brethorst, Holman, Fowler & Dewar, of Seattle, Washington, counsel for the defendants Sam Macri, Don Macri and Joe Macri.

“There were present at such hearing, in addition to the above counsel, the use plaintiff, M. C. Schaefer, William E. Schaefer, and Patrick L. Darcy, who have [1636] already appeared as witnesses in the current trial of the above-entitled action; and Mrs. M. C. Schaefer. None of the defendants appeared in person.

(Deposition of Harold T. Nelson.)

“It Was Stipulated by and between counsel at opening of this deposition hearing that, upon consent being given in the record by the witness thereto, the necessity of the reading back of the deposition as transcribed, and the signature thereof by the witness, is waived; and that upon transcribing the testimony of said witness the same may be certified by Frank J. Kester, the undersigned Notary Public in and for the State of Idaho, before whom said deposition is taken, and by him transmitted directly to the office of the Clerk of the above-entitled Court under seal, there to remain until published by order of the Court.

“It Was Further Stipulated that all objections, other than to the form of the question, may be reserved for all parties, both those now appearing and those served with the Notice, until the publication of the deposition and reading thereof before the above-entitled Court.

“Whereupon, the following proceedings were had, to wit:

“HAROLD T. NELSON

“called as a witness on behalf of the defendants Macri, and being first duly sworn to testify to the truth, the whole truth, and nothing but the truth, testified as follows, upon [1637]

“Direct Interrogatories

“By Mr. Holman:

“Q. Will you state your name, your place of residence, and your present official position, if any,

(Deposition of Harold T. Nelson.)

with the Bureau of Reclamation of the Interior Department of the United States?

“A. Harold T. Nelson, 1219 North Twenty-fourth, Boise, Idaho; Assistant Regional Director of the Bureau of Reclamation, Department of the Interior. That’s for Region One, which comprises the northwest states.

“Q. Mr. Nelson, did you formerly hold an official position with the Reclamation Bureau of the United States Department of the Interior, during the years 1943 through 1945, in the Yakima area?

“A. Why, yes; I was stationed at Yakima from 1937 until July of 1946, on the Roza Division of the Yakima Project.

“Q. By the way, Mr. Nelson, you issued many official communications at that time; and can you tell me whether or not you also used the signature and destination, ‘H. T. Nelson,’ frequently?

“A. Yes, that is the signature that I use on all official correspondence and documents, ‘H. T.’

“Q. Mr. Nelson, for the purpose of the record, will you explain the general scope and purpose of the Roza Project itself?

“A. The Roza Division of the Yakima Project will irrigate a [1638] total of 72,000 acres of land extending in a southeasterly direction from about approximately twelve miles north of Yakima to the vicinity of Benton City, Washington, some ninety-eight miles in length. The area irrigated will be a strip of land of one to four miles wide lying above all of the existing irrigation developments on the

(Deposition of Harold T. Nelson.)

east side of the Yakima River, particularly above the Selah-Moxee Canal, the Union Gap Canal, the Sunnyside Division of the Yakima Project, and several smaller canals, several smaller pump laterals out of the Sunnyside Canal.

“Q. (By Mr. Holman): Mr. Nelson, I neglected previously to ask you to state your qualifications.

“Mr. Olson: We will admit those.

“Q. (By Mr. Holman): For the purpose of the record I would like to have you give your qualifications, including your educational qualifications.

“A. I am a graduate civil engineer. I also have a Master's Degree in civil engineering. I was on the faculty of Montana State College as an instructor in civil engineering for three years, and I served also for a period of some two and a half years for the State Highway Commission of Kansas, prior to entering the Bureau of Reclamation in the Dams Design Section in the Chief Engineer's Office in Denver, Colorado. I was transferred to Yakima from Denver, Colorado, in 1937. [1639]

“Q. Mr. Nelson, request had previously been made upon you by me, on February 22nd of this year, at Boise, to attend the trial of the above action if possible; and have you been precluded from doing that?

“A. Yes, at the present time the status of our work is such that Mr. R. J. Newell, the Regional Director, did not think, in consideration of the

(Deposition of Harold T. Nelson.)

Government's interest in this case, and in further consideration of our work load, that I could be justifiably spared for that assignment.

“Q. Mr. Nelson, will you amplify a little bit your statement in your last answer as to the interest of the Government in the above litigation?

“A. The interest of the Government at this time would be purely an indirect one, due to the fact that the litigants were engaged in the performance of a Government construction contract. The contract itself has been accepted, final estimate has been rendered, with release of contract by the Macri Company; therefore, there is no further direct relationship.

“Q. Mr. Nelson, there have already been introduced in evidence at trial Plaintiff's Exhibit 1, certified copies of contract and bond on Specifications 1062-1; Plaintiff's Exhibit 2, certified copy of contract and bond on Specification 1068; Plaintiff's Exhibit 3, Specification 1062-1; Plaintiff's Exhibit 4, Specification 1068; Plaintiff's [1640] Exhibit 5, sub-contract between the defendants Macri as prime contractor and the use plaintiff, M. C. Schaefer, for performance of a portion of the work called for by the prime contract on Specification 1062-1; and Plaintiff's Exhibit 6, subcontract between the same parties for performance of a portion of the work called for by the prime contract on Specification 1068. I have brought with me copies of such prime contracts and specifications, and I would like

(Deposition of Harold T. Nelson.)

to inquire whether or not you have here available copies of the prime contracts and specifications governing them, from which you could testify.

“A. I have here only a copy of the official specifications. There is on file in our Legal Department a copy of the contract. This is not a copy of the contract; this is a copy of the specifications which are attached to the contract. We have, however, in our files, copies of all.

“Mr. Holman: I ask counsel if he has any objection to referring to the copies I brought with me, for interrogating this witness.

“Mr. Olson: I have no objection to their being copies.

“Q. (By Mr. Holman): With reference to Specification 1062-1, Mr. Nelson, would you kindly state the portion of the area of the project you have previously designated into the Record that is included for work under that contract [1641] number 12r-14825?

“A. This work comprised the construction of a lateral and distribution system below the main canal from approximately mile 59 on the main canal to approximately mile 70 on the main canal, which is roughly the area from the Sunnyside-Hanford Highway to the Benton County line.

“Q. The particular contract to which I have directed your attention covers what laterals?

“A. Gravity laterals 59.3 to 69.8, and sub-laterals.

(Deposition of Harold T. Nelson.)

“Q. Will you explain, please, Mr. Nelson, what, for instance, the first lateral you mentioned, 59.3, indicates, as to the location of that lateral?

“A. That corresponds to the mile point on the main canal from which the lateral starts; in other words, this particular lateral 59.3 takes out of the Yakima Ridge Canal at mile 59.3.

“Q. And that would hold for each of the other laterals? A. Yes.

“Q. Again referring you to the same designated contract and the specifications attached thereto, can you tell me the bid items that were involved in Specification 1062-1? A. Yes.

“Q. Would you mind indicating them by number?

“A. Do you wish me to go through all twenty-eight bid items?

“Q. No, sir, I do not; I just wanted the statement there, by [1642] numbers; number what to what?

“A. Our work is broken down into a series of unit price items, by which the work may be evaluated for purposes of awarding the contract and also by means of which payment may be made conveniently for all of the work performed. In this particular contract there are twenty-eight pay items in Schedule 1, comprising Excavation as Item 1, continuing through all of the Structure items and Concrete Pipe Lines, Metal Work, etc., to Item 28.

“Q. Now, Mr. Nelson, with reference to those items and particularly directing your attention to

(Deposition of Harold T. Nelson.)

the entry Item 7, Excavation Common for Structures, and the printed words there, 8250 cubic yards, what is that quantity?

“A. That quantity, Item 7, is an estimated quantity for the purposes of comparing bids, in advance of performance of the work, of the cubic yards of material that will be excavated under the classification Excavation Common for Structures. There is also a succeeding item, Excavation Rock for structures.

“Q. That’s Item 8? A. That’s Item 8.

“Q. And your answer would be similar for the printed 200 cubic yards? A. Yes.

“Q. Then turning to Item 9, Backfill about Structures, 8650 [1643] cubic yards, would your answer be the same with respect to that yardage?

“Mr. Olson: That question is objected to as being wholly immaterial, as backfill is not involved in this litigation.”

The Court: It will be overruled.

“A. Item 9, as for all other items, is an estimated quantity.

“Q. And specifically, the same answer would obtain for the estimated quantities for Item 12, Concrete in Structures, Item 13, Placing Reinforcement Bars, and Item 16, Installing Gates and Miscellaneous Metal Work?

“A. Yes. We do not guarantee that these quantities are exact.

“Q: Now directing your attention to Item 5, Excavation Common for Pipe Trenches, was that

(Deposition of Harold T. Nelson.)

excavation classification and estimated quantity involved in the Excavation for Structures and Concrete in Structures?

“A. No, the Excavation for Pipe Trenches, where a pipe trench takes out of the structure, is considered as stopping outside of the structure excavation lines except as provided in the specifications where a lateral or pipe trench is continuous through a structure. They are not, however, an overlapping item.

“Q. And where they are continued through a structure, what would be the limits of the respective pay items?

“Mr. Olson: I would like to have the record show [1644] that this question is objected to on the ground that the specifications cover the subject matter of the question, and that the question does not ask for the best evidence.”

The Court: Overruled.

“Q. Well, Mr. Nelson, you were the engineer in charge, were you not? A. Yes.

“Q. I am asking you, from your experience as the engineer in charge, the answer to the last question.

“A. For purposes of payment the specification provision for Structure Excavation is considered as applied in all cases. It's impossible to give a specific answer without studying the circumstances surrounding each and every structure, but in general the Excavation item for each structure is calculated

(Deposition of Harold T. Nelson.)

first and the prism contained within the lateral or ditch section is then subtracted from the overall computation, for purposes of arriving at the net yardage paid as Structure Excavation.

“Q. Mr. Nelson, you will find at the back of the specifications which you have before you some graphs or maps. Can you indicate by calling the page number those which involve concrete structure and those which involve other of the twenty-eight items you have indicated as incorporated within the prime contract?

“A. I presume you refer to the attached profiles?—— [1645]

“Q. Profiles; thank you.

“A. (Continuing): which designate the hydraulic properties of each lateral, the grade line which indicates the amount of excavation and the location of each structure and type of structure. Further reference is necessary to individual structure drawings, in order to obtain the detail of a number of the pay items, such as pounds of metal work, imbedded wood work such as gauge blocks. The profiles are not intended to be all-inclusive.

“Mr. Holman: Will you read my question, please?

“(Former question read).

“The Witness: Would you read that question again?

“(Question again read).

(Deposition of Harold T. Nelson.)

“Mr. Olson: I would like to have the record show our objection to that question, unless it’s tied into the concrete structures on this specific job.”

The Court: Overruled.

“Mr. Holman: Yes, I want to add that, ‘for specific contract in question.’

“A. It is necessary to refer to the drawings attached to the profiles, in order to indicate the occurrence of all of the contract items. In other words, I would be merely quoting the entire set of attached drawings, as well as the profiles.

“Q. Then is it your answer that they are all to be considered [1646] for performance of Items 7, 8, 9, 12, 13, and 16?

“Mr. Olson: That question is objected to as being leading.”

The Court: Overruled.

“Q. State whether or not it is your answer that they are all to be considered for performance of Items 7, 8, 9, 12, 13, and 16.

“Mr. Olson: I would like the record to show that we object to the question on the ground that it’s leading, and on the further ground that the contract and specifications speak for themselves.”

The Court: Overruled.

“A. These drawings do have a bearing on the performance of those items; and in addition, a large number of detailed drawings which were issued from time to time by the contracting officer, specifically the structure lay-out sheets which were furnished as a supplement to the standard drawings contained in the specifications.

(Deposition of Harold T. Nelson.)

“Q. Mr. Nelson, there is already admitted in evidence Plaintiff’s Exhibit 12, which the Clerk has indicated ‘Structure Lay-Out on Specification 1062.’ Are those what you have in mind?

“A. Yes.

“Q. What is the function, in performance of the prime contract and any sub-contracts issued thereunder, of the [1647] structure lay-out drawings? What’s their practical application, Mr. Nelson?

“A. The structure lay-out drawings are issued to illustrate the combinations of standard structures represented in the specifications as applied to each turn-out point and structure site designated on the profiles. The structure lay-out sheets show the combination of standard structures, the elevations, grade lines, directions of flow pertaining to each of the structure lay-out points as these points are staked in the field. The specific data as to elevation and direction varies from point to point, even through the structures involved are in themselves standard structures.

“Q. Now, digressing for a minute to Specification 1068, Mr. Nelson, I make available to you the contractor’s copy of Contract number 12-r-14996, together with a copy of the specifications and profiles and drawings referred thereto, and I will ask you, therefrom, if you are similarly able to indicate the scope of the work on the Roza Project covered by that contract.

“A. That contract covered a continuation of the gravity lateral system below the main canal from

(Deposition of Harold T. Nelson.)

approximately mile 70 to mile 85 of the Yakima Ridge Canal, or from the Benton County line to Snipe's Creek.

“Q. And does the work under that latter contract that I have [1648] indicated also tie by lateral numbers to the same Yakima Ridge Canal as previously testified by you pertaining to Specification 1062-1?

“A. Yes, laterals, 59.3 to 69.8—correction: 70.1 to lateral 84.6, and sublaterals, and in addition the East Turbine Lateral, station 260-plus-00 to the end, including East Turbine Lateral wasteway and diversion channels, mile 51.74 to mile 58.45, and those mile points, the latter mile points, are mile points along the Sunnyside Main Canal.

“Q. Further with reference to that prime contract, are the thirty-six items which are indicated in the schedule the items involved in performance of that contract?

“A. The thirty-six items comprising Specification number 1068 directly comprise work to be performed under Contract 12r-14996.

“Q. And again with respect to this contract, the number of which you have just given, Mr. Nelson, are the quantities which are indicated for those respective thirty-six items bid upon, the estimated quantities for similar purposes as you indicated in your testimony with respect to Specification 1062-1?

“A. They are similar; they cover similar types of work, but differ in structural detail, such as size of pipe line.

(Deposition of Harold T. Nelson.)

“Q. Mr. Nelson, there has been marked for identification in [1649] the present trial of the case, as produced by Mr. Harold Pease of the Bureau of Reclamation in Yakima office, a Defendants Macri Identification number 14, designated as the monthly estimates of progress for compensation; and as similarly bearing identification numbers for the defendants Macri, number 15, Macri and Company payrolls; number 16, M. C. Schaefer payrolls; number 17, monthly control reports, April, 1944—April, 1945, pertaining to both—this latter pertaining to both Specifications 1062 and 1068; similar Identification number 18, concrete inspector’s daily reports, XD 1975, pertaining to Specification 1062; similar Identification number 19, daily reports of inspectors on contract under Specification 1068; similar Identification 20, monthly estimates for progress for compensation; and similarly indicated Identification 21, Macri payrolls under Specification 1068. I wish, please, you would, if you are able, indicate into the record the manner in which those respective identifications that I have called are used through your office, as engineer in charge, toward determination of compensation under the respective contracts; and for that purpose, Mr. Nelson, I will now indicate them severally: Defendants Macri Identification 14, the monthly estimates of progress for compensation under Specification 1062—that would be prepared how and by whom? [1650]

(Deposition of Harold T. Nelson.)

“Mr. Olson: That’s objected to as relating to a document that’s not before the witness. We object to this question, or, we object to this witness being interrogated as to written documents that are not submitted to him for examination, and further on the ground that the question relates to matters that are not involved in the controversy between the use plaintiff and any of the defendants, and is therefore irrelevant and immaterial.”

The Court: Objection will be overruled.

“Mr. Holman: I am willing to have your objection go to all these ones I have indicated, because I have none of them here, since under the terms of their surrender by Mr. Harold Pease of the Bureau of Reclamation and the direction of the Court they would remain in court until either admitted in evidence and substituted by copies so that the originals could be returned or for return to the said Bureau of Reclamation if not admitted in evidence.

“The Witness: As I understand the question, you are asking specifically, now, about the monthly progress estimates for payment to the prime contractor?

“Mr. Holman: That’s true.

“A. Monthly estimates for payment are made not only as this contract but on all of our lateral contracts, as an approximate payment for work performed under the contract up to that time, less hold-back and deductions. In the [1651] case of lateral contracts the progress estimates are based

(Deposition of Harold T. Nelson.)

as far as possible upon quantities of the various items of work as measured in the field and computed in the office, with the addition of certain calculated quantities. The items are given a final audit, and adjustments if necessary are usually made at the time the final estimate is rendered.

“Q. Now I deliver to you, Mr. Nelson, for the purpose of your inspection, the contractor's copies of estimates under Specification number 1062-1 for the month of April, 1944, to and including the month of March, 1945, as estimates number 1 to 12, and estimate number 13, final, a part of which has already been admitted in evidence as Plaintiff's Exhibit 61 at trial, and will ask you if you can indicate therefrom whether or not these are copies of the estimates which were issued for such Specification 1062-1 under your direction and supervision as engineer in charge.

“A. These appear to be copies of the monthly estimates above referred to.”

Mr. Holman: May I digress there, your Honor? I was under the impression until after that the last part of 61 had not been admitted, but I found it was a copy of the exhibit itself. Continuing:

“Q. Similarly, Mr. Nelson, I hand you what appear to be copies [1652] of estimate number 1 under Specification number 1068 for the month of July, 1944, and subsequent monthly estimates to and including estimate number 15 for the month of September, 1945, and estimate number 16, final, for the month of October, 1945, and will ask you to

(Deposition of Harold T. Nelson.)

state similarly with respect to those; number 16, final, having already, for part thereof, at least, been admitted in evidence at trial as Plaintiff's Exhibit 62.

"A. These copies of progress estimates numbered from 1 to 16 do appear to be copies of similar estimates prepared by our office under Specification 1068."

Mr. Holman: At this time, your Honor, I would like to offer in evidence under the testimony of Mr. Nelson Macri's Identification 14, to and including estimate number 12, March, 1945, and as part of our offer, although already admitted in evidence, but to co-ordinate to the plaintiff's Exhibit 61; in other words, that's the complete estimate.

Mr. Olson: Your Honor please, we object to the introduction of those exhibits on the ground that they're not the best evidence as to what took place; they're simply reports made by inspectors to the Bureau of Reclamation, neither of which parties are parties to this suit, and they're not binding upon the use plaintiff, and it is not the proper way to prove any issue of this case. [1653] The inspectors were here, and they can testify to what took place, and if it is material, why, that's the way to prove it, not by some written reports that they've sent in to the Bureau of Reclamation office.

The Court: Those are the progress reports?

Mr. Holman: These are the government's own estimates of the work as they progressed.

The Court: Progress reports?

(Deposition of Harold T. Nelson.)

Mr. Holman: What they call the monthly estimates, your Honor.

Mr. Olson: Those are the payments on the contract?

Mr. Holman: Yes.

Mr. Olson: Then we make the further objection, your Honor, that any payments between the government, or by the government, to Macri Company is immaterial, as far as the Concrete Construction Company is concerned.

The Court: Overruled. It will be admitted. That is identification 14?

Mr. Holman: Identification 14, your Honor.

(Whereupon, defendant Macri's Exhibit No. 14 for identification was admitted in evidence.)

Mr. Holman: Similarly, your Honor, and based upon the testimony of the deponent Nelson as a witness, I wish to offer in evidence estimate number 1 for the month of July, 1944, numbered 1, to and including estimate number [1654] 15 of September, 1945, being Macri's identification 20, and also estimate number 16 of October, 1945, as correlated thereto, and now being plaintiff's Exhibit 62.

Mr. Olson: Well, that one is already in, isn't it?

Mr. Holman: Yes, but I want my reference to tie to it. I can't re-offer that.

Mr. Olson: We make the same objection, your Honor, as to the previous offer.

The Court: Overruled. It will be admitted.

(Whereupon, defendant Macri's Exhibit No. 20 for identification was admitted in evidence.)

(Deposition of Harold T. Nelson.)

(Whereupon, counsel continued to read the deposition of Harold T. Nelson, as follows:)

“Q. Now I ask you whether or not, in the progress of the work, copies of the current estimates were furnished the prime contractor for each of these specifications that I have indicated—Specifications 1062-1 and 1068—furnished by the Bureau to the prime contractor. A. Yes.

“Q. Now, with reference to such estimates for Specification 1062, can you indicate, please, when the first estimate of any bid item is shown to be a quantity paid upon toward completion of performance thereof?

“Mr. Olson: That question is objected to as asking the witness to testify as to the contents of a written [1655] document that's not in evidence, and is not the best evidence.

“Mr. Holman: I will strike the question. I think that's a good objection.

“Q. Mr. Nelson, with reference to the respective items bid upon under Specification 1062-1, will the preliminary estimates as issued by your office currently as the work progressed, indicate when an item first became a computed pay item as progress for that item?

“Mr. Olson: I make the same objection as I made to the previous question.”

The Court: Overruled.

“Q. I am directing your attention now, in my question, to the identification I have indicated as

(Deposition of Harold T. Nelson.)

having been delivered to the Court by Mr. Harold Pease from the Bureau records, and as marked Identification therein as Defendants Macri number 14.

“A. Yes, sir, the copy indicates the first significant progress payment is made for the month of April, 1944.

“Q. Will you amplify that, how it indicates it, with reference to that estimate?

“Mr. Olson: Let the record show the same objection.

“Mr. Holman: Yes.”

The Court: Overruled.

“A. The record indicates that earth work items were performed [1656] in that month; consisting principally of excavation for laterals together with excavation for pipe trenches and some structure excavations; and I might add that I can recall that from memory, as well.

“Q. Then will you state whether or not, in the progression of these estimates to the number 12 as indicated, the respective item numbers and the items under the column ‘this month’ would indicate progressive performance similarly for all the items indicated in the second column?

“Mr. Olson: Let the record show the same objection.”

The Court: Overruled.

“A. In a general way they do show progressive performance. I wish to point out, however, that they do not show exact performance, because fre-

(Deposition of Harold T. Nelson.)

quently corrections are made in previous months' estimates. It's entirely possible for payment to be made for an item in a particular month, even though that work may have been performed in a previous month; so that the payments made in a particular month do not always mean that all of that work was performed in that month in which payment was made.

"Q. And similarly, would the lack of indication of estimated quantity as to any unit indicate that there was no performance of that unit done that month?

"A. I would say that they would indicate that there was a [1657] lack of significant performance. There might have been minor performance, in which the cost of measurement would exceed the payment.

"Q. Now directing your attention specifically to Item 7, or the copy of estimate number 7, for October, showing 19.2 as performance, would that refer to cubic yards?

"A. Yes, all quantities under Item 7 are cubic yards.

"Q. And with reference to estimate number 8, for the month of November, 1944, and the quantity of performance for that month of 6.9 cubic yards, coupled with Item 8 for 18.6—is that cubic yards too, Mr. Nelson?

"A. Yes, that would be cubic yards.

"Q. Would that be similarly so?

"A. You mean, would that indicate performance of those quantities in that month?

"Q. Yes.

(Deposition of Harold T. Nelson.)

“A. Not necessarily. I would be inclined to think, from the small size of those items, that they are calculated adjustments. However, that could be exactly verified by reference to the records on file in the Project Office.

“Q. Then with reference to estimate 9 for Item 7, estimate 10 for Item 7, and estimate 11 for Item 7, can you tell me whether or not those were performed items or a re-determination of pay quantity? I am particularly directing your attention, Mr. Nelson, to the amount of 504.6 in [1658] estimate 6 and 737.7 in item 10, and nothing in estimate 11 or in estimate 12 for the month of March; and then to 332.0 for Item 7 in the number 13 final for the month of June, 1945.

“A. There, again, I would not be in a position to give you an exact breakdown as to how much each of those quantities represents performance in that month, except that I do know that the final for June does include a great deal of adjustment, some adjustment items that may go back through the life of the contract. However, the size of the item in estimate 9 and 10 are such that some performance must have been performed during that month. We would not pay quantities of that magnitude without specific performance. I wish to state in connection with the use of those estimates that they are just exactly what they state: They are estimates. They aren't warranted to be exact until the final is issued. You must realize that in order that the contractor may receive his payment on time,

(Deposition of Harold T. Nelson.)

it is necessary for the field engineer to close his books two or three days in advance of the delivery of the data to the office in Yakima; there is usually a one or two or more days' time-lag. Frequently, it is necessary for our field engineer to estimate what the performance of the contractor would be on the day during which they prepare his monthly estimate, and the contractor may or [1659] may not have performed the amount estimated during the last two or three days of the estimated period, which overage or under-run would be taken up in the next month's estimate or in the final estimate.

"Q. Mr. Nelson, what, in the performance of the work, is the function of the control reports and structure and concrete reports, monthly control reports, April, 1944, to April 1945, which have been marked Defendant Macri's Identification 17, and Macri's Identification 18, concrete inspector's daily report, XD 1975? How are those used with respect to the performance under the contract?

"A. We are required to maintain a file of inspectors' reports. The requirement is not specific as to the content or the number, but the earthwork inspector's report form and the concrete inspector's report are designed to provide the contracting officer with a factual statement of each day's performance under the contract, with particular reference to methods employed, equipment in operation, and labor employed. They are not used as a basis for payment, and are retained in our files as a factual record of the day to day performance on

(Deposition of Harold T. Nelson.)

the job in the event disputes arise between the prime contractor and the Government, and to insure compliance with the labor provisions imposed by the Davis-Bacon Act. I presume you refer to the monthly concrete control report? [1660]

“Q. Yes.

“A. Prepared by the concrete inspector.

“Q. And the concrete reports of the Bureau, also.

“A. The monthly concrete control report is a report required by a special division of the Chief Engineer's Office, the Concrete Control Section, and represents a summation of the month's activities, prepared by the concrete control engineer, usually as a result of his own personal observations and by perusal of the daily reports. The report is intended to acquaint the Chief Engineer's Office particularly with the methods employed in the performance of the concrete items, such as placement of concrete, curing of the same, and technical control, and is likewise not used as a basis for payment under the contract. The specifications for concrete work are unusually rigid, which is one of the reasons for the preparation of the monthly report on the concrete items.

“Q. What is meant by an over-run for concrete structures on the job, Mr. Nelson?

“A. The term ‘over-run’ as we use it designates the difference between the cubic yards of concrete going through the mixer, as compared to the calculated quantity contained in the design, expressed as a percentage of the designed quantity.

(Deposition of Harold T. Nelson.)

“Q. Then would an item in the concrete control reports of the [1661] Bureau for 1944 and 1945 reading in substance as follows, for the month of April, 1945, ‘Over-run for the concrete structure on this job was 14.5%’ indicate a factual determination of that percentage? A. Yes.

“Q. Through your office?

“A. Yes, sir.

“Q. To you superior?

“A. (The witness nodded in assent).

“Q. Correct?

“A. Yes. We determine concrete over-runs very carefully, because the materials going into the concrete mix are furnished by the Government, and there is provision in the specifications whereby collection could be made if this item were deemed unreasonable.

“Q. Mr. Nelson, there have been introduced in evidence as Defendants Macri Exhibit numbers 13-a to 13-o, respectively, what are indicated as inspector’s daily reports. Will you tell me, please, who was J. S. Heers and his function in connection with performance on Specification 1062-1?

“A. Jess Heers was employed as the Chief of Party. However, when a contract starts out, and until operations reach a point that justify a separate inspector for various operations, it is customary for the resident engineer in charge of that contract to submit the daily inspectors’ [1662] reports; and Jess Heers, during a portion of the performance time on that job, was in charge of the engineering

(Deposition of Harold T. Nelson.)

party that set stakes, established lines and grades, and in that capacity he also looked after the performance of the earthwork items.

“Q. Now, the Jess Heers whom you have mentioned is the same as the J. S. Heers whose signature is indicated?

“A. Yes. I wish to make it clear that it's entirely possible for a chief of party to submit an inspector's report, even though he himself may not have been carried on our payroll as an inspector.

“Q. Similarly, with reference to Defendant Macri's Exhibit 13 subnumbers d through 1, will you state, please, who was R. M. Moorhead, and his duties with respect to the job?

“A. R. M. Moorhead was one of our regular staff of inspectors particularly assigned to concrete work, and he in that capacity served for a time on both specifications 1062 and 1068.

“Q. And with reference to additional Defendants Macri Exhibit number 13 subdivision m, and other reports in that subnumber, indicated as having been made by G. R. Reynolds, who was he and what was his function, Mr. Nelson?

“A. G. R. Reynolds was also one of our inspectors particularly assigned to concrete and concrete pipe items of the work, who participated in inspection work on both Specifications [1663] 1062 and 1068.

“Q. And similarly with respect to Defendants Macri's Exhibit number 13 subdivision number o, who was M. Sektnan?

(Deposition of Harold T. Nelson.)

“A. M. Sektnan was also used as an inspector on Specification 1062.

“Q. I seem not to have brought the identification sub-number for similar inspections by a name of Costello, and I do not have his initials. Who was he?

“A. Mr. Costello was used for brief periods on Specification 1062 as a relief inspector when for reasons of illness or vacation leave the regularly assigned inspector was necessarily absent from the work.

“Q. Mr. Nelson, I will ask the reporter to mark for identification the letter I now proffer you, and will ask you if you recognize it as an official communication sent by you to the principal contractor. (Whereupon a letter dated 21 September 1944, from witness to Macri Company, was marked Defendants Macri's Exhibit A for Identification.)

“Q. Handing you what has been marked Defendant's Identification A.

“A. Yes, that is an official communication which I signed, to the Macri Company, dated September 21, 1944.”

Mr. Holman: I offer that in evidence, your Honor.

The Court: Where is the letter?

Mr. Holman: It is attached to the deposition.

The Court: The first one?

Mr. Holman: Yes, the letter of September 21, 1944.

(Deposition of Harold T. Nelson.)

The Court: Oh, yes, I see here it is marked defendant Macri's Exhibit A.

Mr. Holman: Yes, your Honor.

The Court: I think the most orderly way to handle these would be to detach them from the deposition and mark them with a number in this case.

Mr. Holman: I would think so, your Honor.

(Whereupon, Letter Bureau of Reclamation to Macri dated September 21, 1944, was marked defendant Macri's Exhibit No. 79 for identification.)

Mr. Holman: These were each submitted to counsel over there, your Honor, but he had only an opportunity for a cursory reading.

The Court: Yes. Mr. Olson, do you wish to see this?

Mr. Olson: I would like to see it, your Honor, yes. Now, your Honor, this letter, we objected to the introduction of this letter on the ground that it is certainly incompetent, further that it is irrelevant and immaterial. I assume that the purpose is to show that there was some carpenters available, or a surplus of labor at a certain time. Now, the contents of this letter are something that Mr. Nelson wouldn't be permitted to testify [1665] to, I don't believe, if he were here on the stand, what he was advised by the Carpenters' Union, because it would be hearsay. Now, the mere fact that he sits down and writes a letter and says he was told, that certainly wouldn't make the evidence anything other than hearsay.

(Deposition of Harold T. Nelson.)

The Court: I might say that I think I've seen attached to the deposition here a number of letters by Mr. Nelson to Macri. I think we might as well go into the question now of the admissibility of these letters.

Mr. Holman: It is our position, your Honor, in offering this and the other letters with the exception of one or two which Mr. Nelson by his testimony, and I think this is one of them, shows there was a further communication between him and the Concrete Construction Company, are direct communications from the owner or government to the principal contractor, and are part of the documents controlling the performance of the principal contract, however they may have been, upon whatever they may have been based; so far as the principal contractor is concerned they are directions limiting and controlling his operations, and the terms of the sub-contract as I have read to your Honor comprehends the official contract, the prime contract, and all orders and specifications and other documents in connection therewith. Now, your Honor, it is unthinkable that a prime contractor should have [1666] specific directions or specific information pertaining to the contract that he is performing, and not have the sub-contractor bound thereby. It is possibly a right of the sub-contractor to show by his testimony that he didn't know of the contents of that; if such an offer was made I certainly would object to it as outside of the contractual relationship, and the only way that this could not be per-

(Deposition of Harold T. Nelson.)

inent, in my opinion, your Honor, and that pertains to all communications from the engineer in charge, official communications from the engineer in charge——

The Court: That would include oral as well as written?

Mr. Holman: Yes, your Honor; ——the only way that it could not be competent here would be that counsel has devoted and intends to devote and intends to ground nothing in this case on the contract, and that he's suing for breach of contract, and this would not be competent, and still, unless he has fixed the time where that breach is claimed ahead of the communication, why, it still would control, under the documents. If I may illustrate my position a little further, your Honor, if Mr. Nelson wrote Mr. Macri a communication and signed it Harold T. Nelson, as he says here, anything but his official signature, and upon something that had nothing to do with this [1667] job, certainly it would not be competent, even if it was called to the attention of Mr. Schaefer, but anything that is directing or controlling or regulating the performance of the official contract becomes part of the contract terms.

Mr. Olson: Is your Honor inquiring as to the letters generally?

The Court: Well, I think we might as well discuss the matter as it applies generally. Assuming that Mr. Holman is correct in his assumption that any direction as to the manner of the performance

(Deposition of Harold T. Nelson.)

of the contract between the engineer and the main contractor would be material, nevertheless it doesn't seem to me that would open the door for all sorts of hearsay that might be thrown in by the contracting officer. If the contracting officer met Macri and said "I understand there are 200 carpenters roaming around Yakima without jobs," that wouldn't be evidence to this Court that there were 200 carpenters free.

Mr. Holman: Nor with me.

The Court: What is it you claim is material in this letter?

Mr. Holman: I claim this is all material, because it is an official communication.

The Court: The part that there are surplus carpenters, [1668] as told to Mr. Nelson by some third party not before the Court?

Mr. Holman: Yes, but I'm pretty sure the deposition goes on and shows this particular one was communicated to them.

The Court: Well, then your offer is premature.

Mr. Holman: I'll withhold it, your Honor, and I would like to read these additional questions.

(Whereupon, counsel continued reading the deposition of Harold T. Nelson, as follows:)

"(Whereupon, a copy of letter dated 6 October 1944, from the witness to Macri Company, was marked defendants Macri's Exhibit B for Identification.)

(Deposition of Harold T. Nelson.)

“Q. Calling your attention to the second paragraph of this Identification A, will you state whether or not in your official capacity information came to you as to there being a surplus of carpenters in the area, available for employment, as indicated by that letter? A. Yes.

“Q. Now, have you an explanation to make with reference to that, Mr. Nelson? If so, please make it.

“A. The purpose of writing this letter was that I was very interested in combating delayed performance of this contract, and the statement had been made to me at that time that there was a shortage of carpenters, and I was advised [1669] at that particular time that the union did not have an unfilled order for carpenters.

“Q. From whom?

“A. From the Concrete Construction Company.”

Mr. Olson: For the purpose of the record, I move that the answer be stricken, on the ground that it's not responsive, and hearsay.

The Court: Well, I'll grant the motion to strike in that. It is purely hearsay, it seems to me, what he understood and what he was told. Do you want to be heard on that, Mr. Holman?

Mr. Holman: Not any further than I have, your Honor. It is just my conception that the prime contractor under the terms of this contract and specifications is absolutely amenable to all orders he gets from the engineer in charge, and that is an

(Deposition of Harold T. Nelson.)

order, at least it is a notation to Mr. Macri that here is a representation made by the Concrete Construction Company that Mr. Nelson has checked and found is incorrect.

The Court: What we have before us now is the statement of Mr. Nelson, the testimony of Mr. Nelson, that the statement had been made that at the time there was a shortage of carpenters. If that isn't hearsay what is it?

Mr. Holman: Well, I would assume, of course, in a court of law, that might be hearsay. [1670]

The Court: What is this, then?

Mr. Holman: This is a court of law, but in the matter of construction of the contract it is my belief and position that any communication that is sent to the prime contractor with respect to the job becomes pertinent for inquiry.

The Court: Well, I'll grant the motion to strike that part of Mr. Nelson's answer that the statement had been made to him that there was a shortage of carpenters.

Mr. Holman: And may we go on with the rest of the communications, your Honor, and rule on all of them?

The Court: Yes, all right.

(Whereupon, counsel continued reading the deposition of Harold T. Nelson, as follows:)

"Q. Handing you what has been marked Identification B, the original of which has been proffered

(Deposition of Harold T. Nelson.)

and is at present marked for identification by the defendants Macri, to the best of my recollection, I will ask you if you recognize the contents of this copy of such a letter, and if the original was sent by you to both the addressee and to the Concrete Construction Company, as indicated.

“A. I do recall this letter, and to insure receipt in all quarters the original was sent to the Macri Company in Seattle, with a copy to the Macri Company in Sunnyside, and also a copy to the Concrete Construction Company in [1671] Portland.”

Mr. Holman: I think that is “B” we were talking about, your Honor, October 6, 1944. Now, there is a case, your Honor, where he says that a copy was sent to Concrete Construction, and I think there is a copy in here as Macri Identification 40. Your Honor will recall that the original of that communication was proffered to Mr. Schaefer on my cross-examination and dis-avowed by Mr. Schaefer, and therefore the offer was rejected. Now, this is a confirmation by Mr. Nelson with reference to a copy of the same letter, that a copy of that was sent to the Concrete Construction Company. Shall I proceed, your Honor?

The Court: Well, the Court will recess now for ten minutes.

(Short recess.)

(Deposition of Harold T. Nelson.)

(All parties present as before, and the trial was resumed.

(Whereupon, counsel continued reading the deposition of Harold T. Nelson, as follows:

“(Whereupon, a letter dated 13 October 1944, from the witness to Macri Company, was marked Defendants Macri’s Exhibit C for Identification.)

“Q. Handing you what is marked Identification C, will you state whether or not you recognize that as an official [1672] communication issued by you as construction engineer? A. I do.

“Q. And it was sent to the addressee?

“A. Yes.

“Q. And directing your attention to the first two paragraphs of that letter, Mr. Nelson, I will ask you what was the basis for the statements made therein?

“A. The basis was, contract performance up to that time.”

Mr. Holman: As I understand, I’ll go right through all of them, your Honor, and then make the offer.

The Court: Yes, all right.

“(Whereupon, two letters from the witness to Macri Company, dated 19 and 26 December 1944, respectively, were marked Defendants Macri’s Exhibit D and E for Identification.)

(Deposition of Harold T. Nelson.)

“Q. Handing you what is marked Identification D by the reporter, will you state whether or not that was an official communication sent by you to the addressee during the progress of the performance of 1062-1? A. Yes, it was.

“Q. Handing you what has been marked Identification E, will you state whether or not that was an official communication sent by you as construction engineer to the addressee, as indicated?

“A. Yes, it was.

“(Whereupon, a letter dated 28 December 1944, from the [1673] witness to Macri Company, was marked Defendants Macri’s Exhibit F for identification.)

“Q. With reference to the contents of Identification E, Mr. Nelson, and particularly with respect to paragraph 47 of the specifications in Specification number 1062 mentioned therein, will you tell me, please, how Item number 7 was determined as a pay item for compensation to the principal contractor? By Item number 7 I am referring to Excavation Common for Structures.

“A. You are asking for our basis of payment?

“Mr. Holman: Will you read the question, please, Mr. Reporter?

“(Pending question read).

“A. The specifications provide several alternates for determination of the pay lines for payment of structure excavation. In general it is stated that pay-

(Deposition of Harold T. Nelson.)

ment will be made to one foot outside of the neat lines of the structure and up to the surface of the ground on a one-to-one slope; but it also provides that the basis of payment may be altered as determined by the contracting officer to some other basis as staked by the contracting officer, that is, that the slopes might be varied. Now, in general, in a contract of this type, the structures are so numerous that we fell back upon our option of paying for all of the small structures based upon a theoretical [1674] calculation of the excavation involved, and we deducted where we were entitled to make a deduction for common excavation contained, or rock excavation contained, in the lateral prism or the pipe line prism going through the structure, also, on the basis of the calculation, which means that for the majority of the small structures we did not measure the excavation after it was performed. There was an understanding in advance between the contractor and our office as to what that basis for payment was to be, which was based upon the specification provisions. In certain of the larger structures, notably the one referred to in Exhibit E, the lines of that excavation were staked on the ground; but they weren't staked on the ground for all of the small lateral distribution structures.

“Mr. Olson: I move that that answer be stricken on the ground it is not responsive to the question, and on the further ground that any understanding between the contracting officer or the Bureau of

(Deposition of Harold T. Nelson.)

Reclamation and the prime contractor Macri would not in any manner be binding upon the sub-contractor, the use plaintiff."

The Court: It will be overruled, or denied, rather.

"Q. And Mr. Nelson, would your answer be the same with respect to rock excavation, as common excavation? [1675]

"A. Yes, with the following qualification: that rock excavation, the rock excavation calculation is based, however, upon field measurement as to the relative proportions of rock encountered, which cannot be disclosed until the common excavation has been removed from on top of the rock.

"Q. Can you tell me, Mr. Nelson, whether or not the basis of payment as you have indicated by your above answers was communicated to the Concrete Construction Company as sub-contractor, either orally or in writing?

"A. The basis of payment is as provided for in the specifications. However, I am quite sure that throughout the performance of the job there were numerous occasions upon which this might have been discussed among the various engineers in charge of the job and the various contractors concerned.

"Mr. Olson: I move that that answer be stricken as not responsive, and further that it is based entirely upon hearsay.

"Mr. Holman: I will consent that the answer be stricken."

(Deposition of Harold T. Nelson.)

Mr. Holman: And I join, as not responsive.

The Court: Well, all right, it will be stricken.

“Q. What I asked, Mr. Nelson, was whether or not you in your official capacity knew that the substance of what you had [1676] detailed in your previous answer was communicated to the Concrete Construction Company, as to whether they knew that or not.

“A. Yes, I personally discussed our basis of payment.

“Q. With whom?

“A. Both with Mr. Schaefer in our office and with Mr. Darcy on the job.

“Q. That would be Mr. M. C. Schaefer, this gentleman? (Indicating the use plaintiff).

“A. Yes.

“Q. And Mr. Darcy (Indicating Mr. Patrick L. Darcy)? A. Yes.

“Q. Were you on the job during the progress of the excavations for structures? Did you see the excavations for structures being performed?

“A. Yes, not a hundred per cent of the time.

“Q. Yes, but you saw a performance?

“A. I saw a representative performance, yes.

“Q. And was that in progress at the time you discussed it with these gentlemen, that you have indicated in your answer? A. Yes.

“Q. Handing you what has been marked Identification F, will you tell me whether or not that communication was sent by you in your official capacity to the addressee, as indicated? [1677]

“A. Yes, it was.

(Deposition of Harold T. Nelson.)

“Q. Will you tell me, Mr. Nelson, whether or not in the field operation on this job 1062-1 any delay in the completion of concrete structure did result in a delay in performance of the item of backfill?

“Mr. Olson: That question is objected to upon the grounds that it’s assuming a state of facts not supported by the evidence.”

The Court: Overruled.

“A. Obviously you cannot backfill a structure until the structure is in place.

“Q. Then what would be your answer in respect to this job?

“A. That the backfill could not be completed until the structures were completed.

“(Whereupon, a letter dated 6 January 1945, from the witness to Macri Company, was marked Defendants Macri’s Exhibit G for Identification.)

“Q. Handing you what has been marked Identification G, will you tell me whether or not that was an official communication transmitted by you to the addressee, as indicated?

“A. Yes, that was.

“Q. Mr. Nelson, at the time of the performance of Specification 1062-1, what was the general and national situation with respect to shortage of lumber? [1678]

“Mr. Olson: That question is objected to—

“Q. (By Mr. Holman, interposing): If you know.

(Deposition of Harold T. Nelson.)

“Mr. Olson: That question is objected to as not a proper question to be propounded to even an engineer of Mr. Nelson’s qualifications, and on the further ground that it’s immaterial, irrelevant, and incompetent under the terms of the contracts involved in this case, and specifically the sub-contract between defendant Macri Company and the use plaintiff, M. C. Schaefer.”

The Court: I’m not sure that Mr. Nelson has been qualified as an expert on lumber.

Mr. Holman: He says in the next answer he is not an expert. He tells what their experience has been.

The Court: Well, I’ll overrule the objection.

“A. I certainly am not an expert on the national lumber situation. I can say, however, that in all our experience with all our contractors on the project at that time, shortage of lumber was very pronounced on every contract.

“Mr. Olson: I move to strike the answer on the ground that it is not responsive.”

The Court: Denied.

“Q. Can you tell me whether or not there were any less restrictive requirements by the Bureau of Reclamation as to grades of lumber or moisture content of lumber, during the period covered in performance of Specification 1062-1 [1679] than previously?”

“Mr. Olson: That question is objected to on the ground that it’s immaterial, irrelevant, incompetent, and that it is not a complete question in the first

(Deposition of Harold T. Nelson.)

place; furthermore, it is an attempt to vary the terms of the contract existing between Macri & Company and the use plaintiff."

The Court: Well, I'll overrule the objection.

"A. The restrictions are always as provided for in the specifications, but our enforcement of those restrictions was tempered by conditions prevailing at that time; in other words, we did not strictly enforce those provisions.

"Q. Mr. Nelson, was there ever any instances brought to your official attention of the Concrete Construction Company being out of lumber for the purpose of construction of forms for concrete structures?

"A. Mr. Darcy called to my attention many times that he was short of lumber. I do not recall of a instance where they were absolutely out of lumber.

"Q. Did you at any time have any conversation with the Mr. Patrick Darcy above identified at this deposition hearing, with respect to the shortage of lumber?

"A. I would say many of them.

"Q. And can you tell me whether or not at any time that there were any such conversations between you and Mr. Darcy [1680] with respect to the shortage of lumber, the forms in the field had been filled with concrete?

"The Witness: Would you repeat that question?

"(Pending question read).

(Deposition of Harold T. Nelson.)

“A. I can’t answer that specifically.

“Q. To your official knowledge was the work at any time stopped by the shortage of lumber?

“A. The work—I can’t say that it was stopped specifically by the shortage of lumber; there were so many interruptions.

“Q. Can you tell me whether or not there were any instances reported to you officially of the lack of structure excavation for placing forms?

“A. Yes, I do recall a period at the start of the contract in which our reports showed that the Concrete Construction Company would not undertake operations until there was sufficient structure excavation to permit them to operate uninterruptedly.

“Q. And by your report you referred to the field inspectors’ report?

“A. Yes, at the time the Concrete Construction Company was to start operations on the job.

“Q. Mr. Nelson, if the subcontractor’s, Concrete Construction Company, payroll report to and including the week of October 18, 1944, from the week of March, 1944, bears [1681] the stamp of the Bureau, ‘Received October 20, 1944,’ what does that mean?

“Mr. Olson: For the purpose of the record, I object to the question on the ground that it is wholly immaterial so far as any controversy involved in this case is concerned.”

The Court: Overruled.

“A. It indicates delayed submittal of the payroll.

(Deposition of Harold T. Nelson.)

“Q. And was that so, do you recall?

“Mr. Olson: Same objection.”

The Court: Overruled.

“A. Yes, it was so.

“Q. With reference to the copy of 13, final, of June, 1945, on Specification 1062-1, and to the item thereon, ‘Liquidated Damages, six days at \$25.00, \$150.00,’ can you explain with respect to those liquidated damages?— And I will extend my question further, Mr. Nelson: And with respect to the prior monthly estimates on which similar items show. I am interested primarily in whether or not that’s a damage item assessed according to the terms and specifications of the contract.

“A. According to the contract, for each and every day that the contract time is exceeded in the performance of the contract, it is mandatory upon us to make a deduction from the payment, of the amount stated in the specifications, [1682] which was \$25.00 per day for each day beyond the expiration date of the contract until the contract was completed and accepted by the Government, which for this contract was March 31, 1945.

“Q. Then similarly with respect to the final estimate, number 16, of October, 1945, under Specification 1068, and the prior monthly estimates, would your answer be the same for that job and those specifications?

“A. Yes, except that the amount of the damages for 1068 was \$50.00 a day.

(Deposition of Harold T. Nelson.)

“Q. And those deductions for both of the jobs indicated were made? A. Yes.

“Q. Based upon your experience, which you have previously detailed in the record, Mr. Nelson, is lumber an expendable item in performance of concrete structures?

“Mr. Olson: That question is objected to as being wholly immaterial, irrelevant so far as any issue involved in this case, not a proper question to be submitted to an engineer of even Mr. Nelson’s qualifications.”

The Court: The provision of the sub-contract here is that Mr. Macri is to furnish the lumber and it is to be his property after it is used, isn’t that correct?

Mr. Holman: Originally to furnish all the materials except the wire and steel, and then there is a provision [1683] that the lumber shall be cleaned and stacked.

The Court: Well, what is the materiality of this, whether or not it is expendable?

Mr. Holman: I had in mind this only in asking that at that time, your Honor; whether or not lumber is regarded the same as a small tool or an exhaustible item in construction, as against some item that could be used on another job.

The Court: Well, I’ll overrule the objection.

“A. Yes, I believe the specifications so recognize.

“Q. (By Mr. Holman): I will ask you, Mr. Nelson, referring again to the conversations with

(Deposition of Harold T. Nelson.)

Mr. Darcy respecting lumber, specifically whether or not you had any conversation in which his attention was called to the fact that the lumber should be used for forms to the full extent available, before complaining. In the first place, do you recall any such conversation, Mr. Nelson?

“A. I recall a series of conversations with Mr. Darcy during the late summer months, in which performance was lagging, and in which Mr. Darcy stated that his lack of performance was due to shortage of lumber; and during the same period we were very conscious of the delayed performance under this contract. I used to stop at the yard to see just what was going on. I was also aware of frequent notes on the inspectors' reports, and also verbal reports [1684] from my inspectors, quoting Mr. Darcy as stating that unless a certain amount of lumber was received by such and such a date they were going to suspend operations; and I likewise recall Mr. Darcy pointing out to me the dwindling supply of lumber and complaining of the fact that it was hampering his operations. And I would suggest to Mr. Darcy that he should absolutely run out every form, every piece of available lumber he had, and then go out with his entire crew to place concrete with absolutely no lumber left in the yard; and I pointed out that he would then have a positive proof and also a condition that would absolutely prevent him from placing any more concrete. In fact, I urged that procedure, to establish beyond dispute the fact that the lumber was not forth-

(Deposition of Harold T. Nelson.)

coming; but the lumber seemed to come in in drib-
bets, and the state of absolute exhaustion and shut-
down was not obtained so far as I could determine.

“Q. There was no official communication from
you as construction engineer to the principal con-
tractor regarding shortage of lumber, so far as you
recall?

“A. I rather expect that a review of our cor-
respondence to your office might have disclosed,
should have disclosed—should disclose reasons we
considered prime reasons for the delay. I would
have to review the entire file. I do not observe any in
these letters you showed me. A [1685] review of
the Yakima office correspondence file would disclose
our objections. We had no official relationships with
the Concrete Construction Company, as such; our
letters would have to be delivered to the principal
contractor.

“Q. Mr. Nelson, in your answer you said, ad-
dressing me, ‘your office.’ You meant the office of
the Macri Company, did you not? I am their
lawyer. A. Yes, the Macri office.

“Q. You were subpoenaed by this document
which you now hold, to appear, Mr. Nelson, were
you? A. Yes.

“Q. Mr. Nelson, paragraph 47 of Specification
1062-1, and other paragraphs, use the term ‘con-
tracting officer,’ Were you the contracting officer
for this job?

“A. No, I was not; I was the representative of
the contracting officer.

(Deposition of Harold T. Nelson.)

“Q. Who was the contracting officer?

“A. The contracting officer was the Chief Engineer, Walker E. Young, whose name was signed to the prime contract.

“Mr. Holman: You may inquire.

“Cross-Interrogatories

“By Mr. Olson:

“Q. Mr. Nelson, for the record, please state what time it is.

“A. I observe from the Western Union clock on the wall that it is approximately 4:33. [1686]

“Q. You had no official connection, I believe you said, as far as the Concrete Construction Company was concerned? A. No, sir.

“Q. And it's true, is it not, Mr. Nelson, that your field inspectors, as far as the concrete structure work was concerned, were there to determine that the completed concrete structure was in proper alignment and to proper grade and compiled with the specifications of the Bureau? A. Yes.

“Q. And how much trouble the Concrete Construction Company had in getting the hole or the excavation ready to put in the structure forms, was not a matter of concern to your office?

“A. No, it was not.

“Q. And when you figured your progress estimates on excavations and structure excavations, you paid Macri & Company as the prime contractor for the excavations, irrespective of whether or not Macri

(Deposition of Harold T. Nelson.)

& Company had done the excavating or the excavation had been done by the Concrete Construction Company? A. That is correct.

“Q. So that the fact that your progress reports on your structure excavation would indicate that at the end of a certain month or on a certain date that a certain amount of excavation had been done, that would not indicate or [1687] show who had performed that excavation? A. No.

“Q. Now, Mr. Ed Keeler was in your office at the time you were in Yakima office in charge of the Roza Division, Yakima Project? A. Yes.

“Q. And he had charge of the office in which the actual payment figures were made for excavations?

“A. As office engineer he had charge of all computation work in connection with this contract.

“Q. You indicated with reference to a certain report of April, 1945,—I think it was a concrete report—that the overrun of 14.5% would indicate the finding of your Bureau that that percentage of concrete had been poured into that particular structure, more than the design called for?

“A. No, I did not. I stated that that was the difference between the concrete through the mixer and the designed quantities. Now, that did not necessarily mean that all of the concrete that went through the mixer got into the forms. That includes all of the loss between the time the concrete leaves the mixer and gets into the forms. It could include the overage in the forms themselves,

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and it could include an item of waste that was dropped on the ground, that was adhered to the concrete buggy, spillage, [1688] and small losses in handling; but the substantial portion would be represented by the amount that the—either that the forms were in excess of the designed amount or that the subgrade could have been below grade.

“Q. If the subgrade throughout the entire floor of the structure was below grade, that would raise to a considerable extent, would it not, Mr. Nelson, the over-run of concrete in that particular structure?

“A. It would raise the over-run. I would not say to a considerable extent, without knowing the amount of the over-excavation.

“Q. Well, the more that the floor of the excavation was over-excavated, the more concrete it would take to pour that particular structure, wouldn't it?

“A. You are correct.

“Q. And that would also be true on the vertical banks against which the concrete was to be poured without an intervening form; if they were over-excavated and out of line, that also would take extra concrete, would it not? A. Yes.

“Q. And it was one of the duties of your field inspectors to inspect each of the concrete structure forms and to approve it before they permitted the Concrete Construction Company to place concrete in the forms? A. Yes. [1689]

“Q. So that if the sub-elevation was not excavated low enough, that would require, would it not,

(Deposition of Harold T. Nelson.)

Mr. Nelson, additional excavation in order to give the required thickness to the floor of the concrete structure, before your inspectors would permit the pouring of concrete in that particular structure?

“A. Yes.

“Q. It is also a fact, is it not, Mr. Nelson, that in order for the Concrete Construction Company to assemble and place its structure forms in the excavation, it was necessary that the excavation itself first be completed, so as to receive the structure forms?

“A. It's necessary that the hole be large enough to accommodate the form, yes.

“Q. And also that the sub-elevation or the sub-grades be at least low enough to permit the installation of the concrete forms for pouring concrete to the proper elevation?

“A. The subgrade would have to be correct.

“Q. And if the sub-elevation or subgrade was too low, that in each instance would require additional concrete so that the completed floor of the concrete structure was brought to the required grade as required by your grade lay-out plans?

“A. Yes, except that the field inspectors were under instructions to watch for excessive over-excavation, in which [1690] case compaction could be required, thus bringing the subgrade back to grade, in lieu of the more expensive way of filling by use of concrete.

“Q. So that if the Concrete Construction Company in placing the forms in the excavation came to a place where the subgrade was excavated so low

(Deposition of Harold T. Nelson.)

that it would leave a slab of concrete on the floor of the structure to an extent that the dimensions were considered in excess, then your inspectors were under instructions to require tamping or compaction as you term it? A. Yes.

“Q. And that again would have to be done before your field inspectors would permit the pouring of the concrete in the structures?

“A. Yes. I am not saying that that occurred; I am saying that that would be our requirement, if what you say is correct.

“Q. Do you know whether it occurred, Mr. Nelson?

“A. I can't say that I do, not being on the ground at all times.

“Q. Mr. Nelson, with reference to the drawings contained in the Specifications 1062, those drawings are typical drawings, are they not, for all Bureau of Reclamation work, and not prepared specifically for the 1062 or Job 1068?

“A. They are prepared for the type of work represented by [1691] 1062 or 1068. I would not say they were typical throughout the Bureau, but they were typical of the type of work we had in the entire Yakima Project. I would not say they were typical of the entire Bureau of Reclamation, because the type varies depending upon the method of water measurement, whether by weir or by meter gate or by partial flume.

“Q. The structure lay-out plans that you issued, however, are your specific detailed plans from which

(Deposition of Harold T. Nelson.)

that specific concrete structure was to be designed and the concrete placed on this project?

“The Witness: Would you repeat that question?”

“(Pending question read.)

“A. The lay-out structures we issued were in themselves completed designs. They were issued to facilitate the construction on the part of the contractor of the standard drawings contained in the specifications.

“Q. Then, Mr. Nelson, the plans contained on the structure lay-out plans and the elevations shown thereon are themselves the complete detail of each of the structures, from which the structures can be built?

“A. Yes, but they are subject to revision from time to time as the needs of the job may require. They are not the final—necessarily final in all cases.

“Q. And if they are revised, you would then issue a revised [1692] set or revised plan of some particular structure? A. Yes, sir.

“Q. So that they themselves are complete, then, without reference to these drawings in the specifications? A. Yes.

“Q. Now, if the restrictions contained in the specifications, with reference to the quality of lumber, were not enforced, that would cause additional trouble, would it not, to the person making the form panels, in having to use lumber of a poorer grade?

“Mr. Holman: Well, I object to that question as

(Deposition of Harold T. Nelson.)

based upon an assumption that there was any such requirement in the specifications.”

The Court: Overruled.

“A. I would say that it is more difficult to perform—or to construct forms with inferior lumber than it is with first grade lumber; but I am not an expert on form work or carpentry. But I believe that that is obvious.

“Q. You stated you recalled numerous complaints by Mr. Darcy as to the shortage of lumber in building forms on Job 1062? A. Yes.

“Q. And those complaints continued throughout the performance of the contract?

“A. They—not ‘towards the last; they were particularly acute [1693] in about the middle period of the contract. There were no such complaints when he returned to complete the turbine lateral chute and stilling pond.

“Q. That was right near the end of the project?

“A. Yes.

“Q. Now you say that you do not recall a time when the Concrete Construction Company was entirely out of lumber at the yard?

“A. No, I don’t.

“Q. And by that you mean of all types—entirely out of all types?

“A. I mean in general. It could well be that they were out of some specific type, such as two-by-fours; but I was usually aware of either a pile of lumber of the usual types or form panels that were being rebuilt for use.

(Deposition of Harold T. Nelson.)

“Q. There were times, were there not, Mr. Nelson, when they were out of two-by-fours, even though they had other types of lumber, or be out of some other type of lumber when they had other type of lumber when they had other types?

“A. I can’t specifically recall. I frankly was trying to see that brought to a head. There were many threatened cases of suspension, but it seemed to me that the sure proof would be to exhaust everything, report for work with a crew and be unable to perform the work.

“Mr. Olson: I move that the last sentence of the [1694] answer be stricken, on the ground it was not responsive.

“Mr. Holman: I resist. It was solicited entirely by the question.”

The Court: I’ll grant the motion to strike as not responsive, all except “I can’t specifically recall.” That may stand.

“Q. (By Mr. Olson): It is also a fact, Mr. Nelson, is it not, that the lumber as it was delivered on the—at the yard on the project, came in in dribblets, I believe you said?

“A. Yes; I at no time saw a large supply.

“Q. Now, in the excavation of these structure holes, in addition to the rough excavation which could be done by a shovel, there had to be considerable hand excavation before the forms could be installed and the concrete poured; isn’t that true?

“A. Yes. I wouldn’t say as to relative amounts. I would say in every case there is a certain amount

(Deposition of Harold T. Nelson.)

of required hand-trimming, especially in corners that cannot be reached by a machine, and in narrow head-walls, and in cut-off walls, below grade.

“Q. And in many of these excavations, particularly those that contained two or three structures, they would have sub-elevations of three to four or possibly more different elevations?

“A. Yes, the flow line of the various structures were not at [1695] a common elevation.

“Q. And those different elevations required hand excavation in order to get the relative sub-grades to the proper grade?

“A. Yes, I would say that.

“Q. And also the vertical banks against which the concrete was to be poured without the use of an intervening form, likewise had to be hand-trimmed rather than doing it with a power shovel?

“A. If that is the method elected by the contractor, that is true. However, if he over-excavates, then back-forming is required.

“Q. And that again is a hand operation?

“A. Oh, yes, the back-forming would be. For instance, in the case of a cut-off wall, which is only six inches in thickness, obviously a machine would dig a trench three or four feet—four feet wide, in order to form this six-inch wall; that would require a form wall and a considerable amount of backfill, so in some—a number of instances there are two alternates, and we have had contractors use each alternate—use both alternates, depending upon their relative costs of the work. I might say we try

(Deposition of Harold T. Nelson.)

to encourage holding the excavation of head-walls down to the minimum widths, if we could, because the backfill was objectionable to us. We preferred the [1696] natural ground to backfill, if it were possible to obtain.

“Q. What your office, what the Bureau, was concerned with primarily, throughout the entire performance of 1062, was to get the work completed and the concrete structures poured and the forms removed, rather than who was at fault for not getting them done; isn't that true?

“A. That is correct. We were interested in performance of that contract within the contract performance time.

“Mr. Olson: That's all.

“Redirect Interrogatories

“By Mr. Holman:

“Q. Mr. Nelson, in measuring for pay quantity on Specification 1062-1, was complete compliance with the measurements as indicated on the structure lay-out drawings required, as against the complete adaptability of the structure to the purpose of the project?

“Mr. Olson: Objected to as not being proper redirect examination.”

The Court: Overruled.

“A. We insisted upon full compliance to the lines and grades insofar as they might affect the hydraulic properties of the structure. However, we

(Deposition of Harold T. Nelson.)

did encourage the carpenter foremen of our various contracts to standardize if it was possible, possible for them to do so. Our set of lay-out drawings represented the structures as we desired to have them built; but it was our experience that various contractors [1697] had various methods of paneling structures so that panels could be used interchangeably from one structure to another by slightly altering our design sometimes, particularly heights of head-walls or thickness, where stability of the structure was not affected; sometimes we could accomplish standardization with improved efficiency. And we always were willing to make small alterations in the interest of standardization or increased efficiency. And we found it undesirable to consider those lay-out drawings as too rigid, except insofar as hydraulic properties were concerned, because different contractors had different ideas as to how they were going to perform this construction.

“Q. Mr. Nelson, in the performance of the concrete structures, was wire permitted to be used?

“Mr. Olson: Now I am going to object to that as an attempt to vary the specifications.

“Mr. Holman: I will withdraw the question, then.

“Q. (By Mr. Holman): Did the Bureau require of the principal contractor or the subcontractor on Specification 1062 the use of she-bolts?

“(Pending question read.)

“Mr. Olson: No objection, if he knows.

(Deposition of Harold T. Nelson.)

“A. She-bolts were not required. By reference to the specifications you will see that any patent form tie may be [1698] used, providing the imbedded part of the form tie is removed for a specific distance below the surface of the concrete; and we have had any number of patent form ties used in lieu of she-bolts. You will find that our requirement is that the forms be supported in such a way that they are rigid and capable of holding the concrete under vibration. And I might also add that the majority have used she-bolts for that purpose, but some of them have not.

“Recross Interrogatories

“By Mr. Olson:

“Q. Well, it is a fact that in this particular case, on 1062, your field inspectors did require it, isn't it, Mr. Nelson?

“A. Not to my knowledge. The contractor could have—or, there could have been a protest on that. We require that the forms be supported in the manner as stated in the specifications.

“Q. Then, Mr. Nelson, do I understand from your answer to Mr. Holman's question, the use of she-bolts is a generally used and accepted practice of holding forms in place and rigid for receiving concrete? A. Yes.

“Q. And would you say that it is a preferred method with the Bureau of Reclamation, in holding concrete structure forms in place? [1699]

(Deposition of Harold T. Nelson.)

“Mr. Holman: That’s objected to as outside of the issues, and calling for a statement from the Bureau representative upon a subject covered by the specifications themselves.”

The Court: Overruled.

“A. I would say that the Bureau’s position is covered by the specifications; but personally, I like to see she-bolts on a job.

“Mr. Holman: I move that the latter portion of that answer be stricken as not responsive, and as wholly immaterial and outside of the issues.”

The Court: Denied.

“Q. As engineer in charge of this project 1062 and in charge of the Roza Division office of the Yakima Project, that is your personal preference, that the use of she-bolts be employed in the holding of concrete structure forms in place?

“Mr. Holman: I object to that question as prolix and improper and having been already answered.”

The Court: Overruled.

“A. I consider them the most reliable.”

(End of deposition.)

Mr. Holman: And then there is a Reporter’s Certificate and a Notarial Certificate, which I will not read. I respectfully ask that the deposition as published be [1700] filed, and the contents as read be incorporated in the reporter’s record.

The Court: I think that may be a little premature, Mr. Holman, until we have a ruling on the attached exhibits.

Mr. Holman: That may be, your Honor. I didn't want to forget that. I would like to offer in evidence from Macri's identification 17, with the request to the Clerk that a copy be supplied in lieu of the copy contained in such identification, the letter of May 21, 1945, from Yakima, Washington, from the Concrete Engineer to the Construction Engineer, and specifically with reference therein to specification 1062, schedule number 1, the last sentence of which, reading "Over-run for concrete structure on this job was 14.5%" is referred to in Mr. Nelson's deposition, although tied to the wrong month, and I would like similarly to offer as so identified by Mr. Nelson——

The Court: What was that first one?

Mr. Holman: May 21, 1945. It is the report, apparently, for the month of April, but it is dated May 21, 1945.

The Clerk: I will designate that as identification 17-a.

(Whereupon, letter Concrete [1701] Engineer to Construction Engineer, dated May 21, 1945, was marked Defendant Macri's Exhibit No. 17-a for identification.)

The Court: This whole group of documents there is marked as defendant Macri's Identification 17?

Mr. Holman: Yes, your Honor.

The Court: Now you're offering just portions of it?

Mr. Holman: Just the one letter. It runs, your

Honor, as late as February 6, 1947, and it starts as early as 1941.

The Court: Yes——

Mr. Holman: This 17 does; and I would like similarly to offer the letter of May 22, 1944; that would be 17-b, particularly the reference therein to specification 1062.

(Whereupon, letter Concrete Engineer to Construction Engineer, dated May 22, 1944, was marked Defendant Macri's Exhibit No. 17-b for identification.)

Mr. Olson: Are you offering the second paragraph?

Mr. Holman: I'm offering the communication, including the paragraph. I will be glad to restrict it to the paragraph, if you prefer, counsel, merely showing the head of the letter and the address and then the particular [1702] paragraph.

Mr. Olson: Well, your Honor, we object to the offer of 17-a on the grounds that it's not admissible; it purports to be a letter from the Concrete Engineer to the Construction Engineer, in which the over-run of a certain structure is purported to be 14.5%, referred to in the deposition. It seems to me that is obviously not admissible. What right of cross-examination do we have to determine the cause of that over-run? As explained by Mr. Nelson in his testimony that over-run could result from any number of things, possibly from the defendants' own negligence; most likely because of improper excavation. Now, that being the situation, your

Honor, and nothing here to show what did cause the over-run, certainly it's not admissible. If the concrete inspector can remember and could get on the stand and testify that that was our fault, then we could cross-examine him about it and ask him about it, but to put this letter from the Concrete Engineer to the Construction Engineer into evidence, your Honor, I suppose counsel intends to indicate and argue that we were at fault some way, and if that is it, your Honor, you can readily see that we don't have any opportunity to examine, except insofar as I did indirectly with Mr. Nelson as to the various possibilities that might bring that about. [1703]

The Court: This I understand is a letter, an inter-bureau communication, from one agent or official of the bureau to another?

Mr. Holman: From the Concrete Engineer to the Construction Engineer.

The Court: A letter?

Mr. Holman: An official communication; I'd say it is not a letter; it's a report, your Honor.

The Court: Well, let's see it; maybe I can tell more about it.

Mr. Holman: Looks to me as if it's drawn in the regular form.

Mr. Olson: Further objected to on the ground that it's wholly hearsay as far as this trial is concerned, as far as the plaintiff is concerned.

Mr. Holman: I want to submit, your Honor, that that's part of the official records of the government, and so identified by Mr. Pease here, and it

was so submitted by Mr. Pease. In other words, it's not the same as an inter-office correspondence, an inter-office report, and as I told your Honor, that particular 17 runs from 1941 complete to 1947; these are the ones indicated currently in this period. There's nothing that any of the parties could do one way or the other that could make it any different or change that factual record; that's [1704] what it is, a factual record from the government's viewpoint.

The Court: Well, it seems to me that we have to draw the line somewhere on what is and what is not admissible on these documents which are connected in some way with the Bureau of Reclamation. My view of it would be that the official entries or records made and kept in due course and progress of its work, and customarily made and used by the Bureau of Reclamation, where they pertain to this work and are otherwise material, would be admissible.

Mr. Holman: Those are, your Honor.

The Court: What is that?

Mr. Holman: Those are; they're the report from one officer to the other officer. That's what they say.

The Court: Well, I'll overrule the objection and admit that paragraph that pertains to 1062.

(Whereupon, Defendant Maceri's Exhibit No. 17-a for identification was admitted in evidence.)

Mr. Holman: Then, Mr. Clerk, may I change my instructions and may I ask the clerk, please,

to indicate the heading and the date, and then asterisks, and then the particular paragraph pertaining to 1062.

The Court: I might say that so far as this Court is concerned, matters of that kind would not be construed to have very much probative value unless they're tied in [1705] or identified or corroborated by other evidence. As Mr. Olson has pointed out, this communication doesn't show the cause of over-run, and it is of very little significance, it seems to me, unless it is explained or the fault laid by other evidence.

Mr. Holman: I understand, your Honor. Did your Honor rule similarly with respect to the paragraph of May 22, 1944, which Mr. LaFramboise has marked 17-b?

The Court: I haven't seen it.

Mr. Olson: I haven't either, your Honor. I haven't read it. I could, in just a minute.

The Court: All right. I might say, there is a reference in Mr. Nelson's deposition to an over-run, which seems to be this one, although there is a discrepancy in dates. It does tie it in with the testimony.

Mr. Holman: Your Honor, his answer was upon the same words which are in this.

The Court: Same percentage of over-run, you mean?

Mr. Holman: I quoted the wording of this, but I had the—it is a letter, apparently, for the month of April, and issued in May.

Mr. Olson: Well, I make the same objection,

your Honor. It puts the use plaintiff in a position where we're just helpless to interrogate or inquire about those matters. There isn't anything that I can see that [1706] gives any particular standing to a document because it happens to be a letter because it happens to be written in the Bureau of Reclamation. Counsel refers to it as an official document, but there is no more standing to that than a letter that Mr. Darcy might have written to Mr. Schaefer. We've got a lot of them I would like to put in evidence, being factual claims out there on the job.

Mr. Holman: I do not make any such claim. The witness Harold Pease made the statement that they are official communications.

Mr. Olson: Well, those would be official communications as far as the Concrete Construction Company is concerned. For example, he's got "Excavations well ahead." Does that mean the fine grading is done? Every one of the inspectors told us they didn't pay any attention to the fine grading; the thing they were concerned with is whether the structure was right before the concrete was poured.

The Court: Who is the author of this communication; Curtis L. Tyler; he has not been called, or have you taken his deposition?

Mr. Holman: No, sir. If I have time I'll take his deposition. He's somewhere in the East.

The Court: Well, you probably won't have time to [1707] take any more depositions. I'll sustain the objection to this. It seems to me manifestly

unfair to bring in evidence which is not subject to interrogation. That's 17-b, rejected.

(Whereupon, Defendant Macri's Exhibit No. 17-b for identification was Rejected.)

The Court: Well, it's time for the noon recess.

Mr. Holman: Your Honor, and counsel, before recess if I may make this observation and request. Mr. Black has again returned as notified by the Clerk. He's in the same excruciating position with respect to his power line, and I would like very much to relieve him and let him go, and similarly, there is Mr. Bjorth, from Seattle, who was called in connection with the signing of the contract, and who is an estimator. I would like, if I may, to call him this afternoon.

Mr. Olson: My only position, your Honor, is I would like to have counsel maintain some semblance of continuity. I don't see, after going through this deposition, what possible reason there was for interrupting Mr. Macri's testimony by reading that deposition. I do, however, want to accommodate Mr. Black, and I know the position he's in, and I'll be glad to consent to it.

The Court: That is as to Mr. Black.

Mr. Holman: Mr. Bjorth is a factual witness on [1708] the matter of signing the contract.

The Court: I know the situation with respect to Mr. Black. I think he should be permitted to testify and go as soon as possible, but we're getting this matter badly mixed up, it seems to me. We'll have to come back to the admissibility of these

letters attached to the deposition, then we've got Mr. Macri in the air here, and have to try to remember what he's testified, for the purpose of cross-examination. Mr. Black, and then I think we should finish with Mr. Macri.

Mr. Olson: Well, I'd like to accommodate Mr. Black.

The Court: Well, I say, with the exception of Mr. Black, I think we should try to go in order.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

Yakima, Washington, Thursday, March 13, 1947
1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, may I call Mr. Black to the stand?

The Court: Yes.

Mr. Holman: Or does your Honor prefer to rule on those letters first?

The Court: Well, we may as well have him testify [1709] if you have him ready.

JAMES A. BLACK

recalled as a witness on behalf of the defendants Macri, testified as follows:

Direct Examination

By Mr. Holman:

Q. You are the Mr. James A. Black who was previously subpoenaed as a witness for the defendants, and who testified at the direction of the plaintiff in his case in chief? A. Yes.

Q. Mr. Black, would you state into the record your qualifications with respect to experience on fine grading of structures for concrete, of excavations for concrete structures on reclamation projects?

A. I fine graded at Zillah, I don't know the project number, from about the first of March until about the middle of July, 1944, and I fine graded on 1062 from about the 21st of November, 1944, until January 31, 1945, and from that date on project number 1068 I fine graded the structures, all the structures on that project, finishing up about the middle of October, 1945. I went from there to project 1111, the last project of the Roza Division, near Benton City. I fine graded all the structures on that from the period of February 1, 1946, to about August 1, 1946.

Q. Now, what has been your general experience in construction [1710] work, Mr. Black?

A. I started out on construction work in 1917 for the United States Reclamation Service. I

(Testimony of James A. Black.)

followed that until about 1922, and that was also irrigation work, surveying and laying out laterals and structures. I left at that time and went farming until 1934, when I went to work for the—it was either 1933 or 1934, I can't be definite on the date, for the United States Army Engineers at Fort Peck, Montana. I stayed there until the tunnel section was through, I believe it was 1936, I believe, and I followed power line construction from that time on until——

Q. Well, may I interrupt, Mr. Black? Roughly, then, since 1917, except for a period that you were farming? How long was that?

A. That was about ten years, roughly.

Q. Except for that your work has been in construction? A. Yes.

Q. Now, you went on to 1062 when?

A. About November 21, 1944.

Q. And I believe you said you stayed on 1062 until when?

A. On 1062 I stayed until about January 31, 1945.

Q. And what was your capacity on 1062? What were you doing? A. Well, I——

Q. Let me ask it this way. Will you state whether or not you had charge of the fine grading on 1062? [1711]

A. Yes.

Q. Can you tell me anything with respect to any revisions made by the government on lateral 63.2 at or about the time you began fine grading?

(Testimony of James A. Black.)

Mr. Olson: May I have that question?

(Whereupon, the reporter read the last previous question.)

A. That was a revision. It was originally designed for an open lateral, that is, the lower end of the lateral was designed for an open lateral, and it was changed over to a pipe line, instead. The open lateral was discontinued, although it had been dug, and there was a change in the structures on that lateral.

Q. Now, did you do any digging on account of that change? A. Yes.

Q. How was that handled, by machine or by hand? A. By hand.

Q. And was there a reason for that?

A. Well, it was, as I recall it, at least one of the structures was a rock, entirely, it was a rock hole; the machine couldn't dig that.

Q. What did you say, a rock hole?

A. Yes, a rock hole.

Q. Now, do you recall whether or not you went back on lateral west turbine 2.0 and put in some structures there [1712] by hand, again on government revision; do you recall that?

A. Yes, I did, I'm pretty sure.

Q. Where did you start fine grading on 1062, do you remember, Mr. Black, what lateral?

A. I believe it was on lateral 66.6, if I'm not mistaken.

Q. Lateral 66.6?

A. I believe so. I'm not just positive of that.

(Testimony of James A. Black.)

Q. Can you tell me what was the condition on lateral 59.3 at the time you started work in November, 1944? A. No, sir, I cannot.

Q. Well, can you tell me whether or not work had been done pretty well up to the place you started, or not? I refer to forms, and to pouring of concrete? A. With few exceptions, yes.

Q. Now, handing you Exhibit 12, I was wondering if you could more nearly identify yourself with respect to the lateral—or just a minute, on defendant Macri's Exhibit 75. Have you got 1062? You have. Can you from that identify the lateral that you started to work on?

A. I'm almost positive it was 66.6.

Q. Did you currently make diary entries, Mr. Black? A. No, not on 1062.

Q. Then from the place that you began, will you tell me what fine grading you did with respect to the end of the project? [1713]

A. I believe that I fine graded between 145 and 150 structures on 1062.

Q. Well, would that be to the end of the project, or not? A. Yes.

Q. In other words, did you fine grade to the end of the project?

A. Yes; there were some few structures—

Q. Mr. Black, I would like to ask you whether or not in each instance of performing fine grading that you did perform, you did your level best to comply with the grades and the stakes as fixed for your guidance?

Mr. Olson: Just a minute; I object to the ques-

(Testimony of James A. Black.)

tion on the ground it is leading and suggestive, and the further ground it is immaterial.

The Court: The question is leading. The objection is sustained. The question is the manner in which he did it.

Q. That's right, your Honor, but obviously if I asked him now—for the purpose of the record, will you state how you performed your work?

A. Well, I done my level best to get it on line with the government reference stakes, and on grade according to their elevation given on reference hubs. Due to the frozen condition of the ground, why, it was impossible to do a neat job at that time. [1714]

Q. Now, what was the condition of the surrounding soil itself?

A. You mean the type of soil?

Q. Yes, at that time—well, give me the types of soil and what was the condition at that time. What type of soil was it, in the first place?

A. Well, it was various types of soil. Some of it was clay, some of it was sand, and I believe what they call volcanic ash, and there was considerable rock.

Q. And you spoke of "at that time." Now, to what do you refer with respect to the time, what's the effect of that?

A. Well, it was during the part of the year that the ground was partly frozen, or frozen to the extent of five or six inches.

Q. And did that make the work more or less difficult?

A. Pardon?

(Testimony of James A. Black.)

Q. Did that make the work more or less difficult?

A. It made it a little more difficult.

Q. I believe you testified in the plaintiff's case in chief that you recalled an occasion where the crew waited while you completed fine grading. Do you recall that?

A. Yes.

Q. Can you tell me where that structure was?

A. I could show you on the map.

Q. On Exhibit 12—oh, pardon me, Exhibit 75.

A. It was on lateral 68.3.

Q. Then with reference to 12 could you identify the structure?

A. Yes.

Q. What hole or structure?

A. Pardon?

Q. What hole or structure was it?

A. Well, it's not marked on here.

Q. Handing you 12, can you identify that?

A. There is a revision sheet on that that I don't find in here.

Q. A revision sheet; well, if you can't recall it, that's all right.

A. I don't seem to find that revision sheet in here that that structure was on. It should have been the structure ahead of 287.

Q. That would be on what lateral?

A. On lateral 68.3.

Q. And what page?

A. I don't know; this is 44. It should have been the structure ahead of this.

Q. You say ahead of this?

A. Yes; this is taken off the pipe line.

Q. When you say "this," you're referring to—

(Testimony of James A. Black.)

A. Structure 285 revised, 286, and 287.

The Court: I think the witness had better find it if [1716] he can, and then testify as to what it is. All this running commentary is going to be of no value in the record.

A. Sir, I can't find that structure in here.

Q. You can't find it? It was on lateral 68.3?

A. I'm pretty sure it was, yes.

Q. What crew was it that waited, the Concrete Construction crew?

A. Well, there was two carpenters.

Q. Two carpenters, and how long did they wait while you were doing that work?

A. About two days and a half.

Q. Now, during that time, were they performing any other constructive function in the vicinity at all, or did they just wait?

A. No, they just waited; they assembled their forms and laid them out.

Q. Sir? A. They laid out their forms.

Q. Were there other structures at the time excavated and fine graded that would have been available for forms, to your knowledge?

A. I can't remember that.

Q. You can't remember that, sir; so that would be 16 hours of waiting—how many hours of waiting would it be? A. Pardon? [1717]

Q. How many hours did they wait?

A. About 20 hours.

Q. 20 hours total, you mean? A. Yes.

Q. Per man, for the two carpenters?

A. Oh, 20 hours per man, yes.

(Testimony of James A. Black.)

Q. That would be about 40 hours of waiting altogether? A. Yes.

Q. And they did not participate in that work, they just waited, is that correct? A. Yes.

Q. Will you tell me whether or not in any instance that request was made upon you to return for fine grading, if you did it; request by the Concrete Construction Company?

A. I was asked to go back and check up and finish two or three structures, or several structures, I wouldn't say two or three; several structures.

Q. Well, did you do it, sir?

A. In every instance when it was possible for me to do it I did it.

Q. And would you estimate to me approximately the total number of structures that you were called upon to come back and excavate, by the Concrete Construction Company?

A. Well, that's pretty hard to do. 10 or 12, anyway.

Q. Ordinarily, about how much time would it take you and any [1718] of your assistants to fine grade for a structure?

A. That varied a good deal. It depended on how close the hoe had roughed out the structure. Sometimes we could fine grade a structure in two hours, and other times it would take all day.

Q. That would be yourself alone, or yourself and crew?

A. Myself and crew; I usually just used two men to a structure.

(Testimony of James A. Black.)

Q. In other words, it would be Mr. Black and two men? A. Yes.

Q. And your estimate was on that basis?

A. Yes.

Q. Can you from the lay-out book, Exhibit 12, indicate any work on the east turbine where the fine grading was done by Concrete Construction Company forces?

A. Yes, I believe that there was two on there that they completed.

Q. Could you locate those, Mr. Black?

A. I believe I can.

Q. If you will do that, please.

A. To the best of my knowledge they completed fine grading on 451B, 451A, 451R, 453B, 453A, and 453R.

Q. Was that a nest of structures there?

A. It's two separate structures.

Q. And can you tell me the amount of time that the Concrete [1719] Construction Company men did expend on that fine grading?

A. No, I wasn't there; I couldn't tell you.

Q. Can you tell me why that was fine graded by them instead of you?

A. I was short of help, for one thing, and I was quite a considerable distance away, as I recall it.

Q. Was any request made for you to return and do that, or not?

A. I believe I was asked by one of the carpenters that I met on the road. He told me that the structure wasn't right.

(Testimony of James A. Black.)

Q. Well, was any request made upon you by Mr. Darcy? A. I don't believe so.

Q. Yes, sir; now, I'll ask you whether or not requests were made upon you for any fine grading, and when you checked it if you found always that it was required?

A. There was one or two instances where I found that it wasn't required.

Q. Did you find the reason it was not required?

A. Well, in one condition I know of, the carpenters kind of got mixed up.

Q. Will you explain that, how they got mixed up, what it was?

Mr. Olson: I ask that last answer be stricken, your Honor, as not being responsive. [1720]

Mr. Holman: I asked him the cause, your Honor.

Mr. Olson: He said the carpenters got mixed up. I don't know what that means.

Mr. Holman: I've asked for explanation.

The Court: Well, I'll deny the motion. He can explain.

A. Well, I believe, if I recall right, that their structure lay-out print was either muddy or something; they misunderstood the elevations on it, as near as I can remember.

Mr. Olson: You say it was muddy?

A. Muddy, yes.

Q. The print was muddy. Did you have anything to do with the lumber at all, Mr. Black, with the lumber? A. No.

(Testimony of James A. Black.)

Q. Have you any independent recollection at this time as to the lumber condition there?

A. I do not, no.

Q. Was any complaint ever made to you about any lumber? A. No.

Q. Now, in your fine grade excavation, you were thrown in contact with the—will you state whether or not you were thrown in contact with the carpenter crew in the field setting up forms?

A. A few times, yes. [1721]

Q. Directing your attention to plaintiff's Exhibit 23, after removing the model, I'll ask you if in all of your experience you have seen any structure excavation of that type with respect to slopes?

A. Not that neat, no.

Q. Have you seen any structure excavation of that type of slope?

Mr. Olson: That's objected to as being immaterial, if the Court please, if he's seen one of that slope.

The Court: I can't see the materiality of that. I'll sustain the objection.

Q. Mr. Black, can you tell me with respect to any excavations that you were on, what was the distance out that you fine graded from the neat line of the concrete structure?

A. They were always staked one foot.

Q. Well, that answer is not exactly responsive; I asked what you did. How did you fine grade?

A. You mean distance out?

Q. Yes, sir. Did you fine grade to that, sir?

(Testimony of James A. Black.)

A. I tried to make it one foot.

Q. Yes, sir. At any time, Mr. Black, was any writing or notice with respect to excavation furnished you by any member of the Concrete Construction Company crew? A. No. [1722]

Q. No notice of any kind; was any tabulation of any claimed work performed in excavation, fine grading, or otherwise, furnished you from any of the Concrete Construction Company crew?

A. No.

Q. Referring to specification 1068, Mr. Black, would you indicate from these documents and maps that I hand you what ones you used in your work on 1068?

A. On 1068, you mean the structure lay-out plan?

Q. Yes, sir; what ones you used.

A. These.

Q. When you say "these," the ones you hold now? A. Yes.

Q. I would like to get them in the order that you have them now.

A. I have referred to these. That's my daily report.

Mr. Holman: May I have the daily report marked as the first identification, and then the other two?

(Whereupon, Black's Daily foreman report was marked Defendant Macri's Exhibit No. 80 for identification.)

(Testimony of James A. Black.)

(Whereupon, Structure lay-out on Specification 1068 was marked Defendant Macri's Exhibit No. 81 for identification.

(Whereupon, Structure lay-out on Specification 1068 was marked Defendant Macri's Exhibit No. 82 for identification.) [1723]

Q. Now, handing you what has been marked Macri's identifications 80, 81 and 82, those are the three compilations or documents that you indicated from the stand? A. Yes.

Q. 80 is what?

A. 80 is my daily foreman's report.

Q. And did you keep a daily form report throughout the job, 1062?

A. I did—not 1062.

The Court: This is 1068.

Q. I'm sorry, 1068? A. 1068, yes.

Q. Does 80 carry that report that you kept, identification 80? A. Yes.

Mr. Holman: I offer that in evidence, your Honor.

The Court: Let counsel see it.

Mr. Holman: Yes, and I also offer identifications 81 and 82.

The Court: What are they?

Mr. Holman: Oh, thank you——

Q. What is 81 and 82?

A. They're structure lay-out plans.

Q. Now, will you tell me whether or not identifications 81 and 82 for specification 1068 carried

(Testimony of James A. Black.)

the same functions for that work as Exhibit 12 for specification 1062, [1724] schedule 1?

A. That's exactly the same.

Mr. Olson: Your Honor, this is kind of a bulky document to look over. As I understand it, Mr. Black, this Macri's identification 80, entitled "Daily foreman report," is a report that you made to Mr. Macri, did you?

Witness: Well, yes; it was kept in the office all the time, our field office.

Mr. Olson: But it is a report made from you to Mr. Macri's field office? A. Yes.

Mr. Olson: Your Honor, it seems to me that certainly is not admissible as having any connection with any claim against Concrete Construction Company, or as any defense to the Concrete Construction Company's suit against Macri.

The Court: What is the purpose of this?

Mr. Holman: The purpose of this is just the converse of what counsel indicates. The cross-complaint of Macri against the Concrete Construction Company is for the loss sustained by reason of their not performing that contract, and this is the daily report record of the work done in completing the structures.

The Court: Well, as I understand it, on 1068 there's no question that Concrete Construction Company [1725] did not perform——

Mr. Holman: That's correct.

The Court: ——any part of it——

Mr. Holman: That's correct.

(Testimony of James A. Black.)

The Court: —and that Macri performed all of it?

Mr. Holman: That's correct.

The Court: Then the only question there, it seems to me, would be whose fault it was that the Concrete Construction Company didn't perform, and what was Macri's cost in doing it.

Mr. Holman: That is correct.

The Court: How does that bear on this?

Mr. Holman: I had in mind, your Honor, in view of the fact that Mr. Black, he's to be allowed to go, I will have them identified and withhold the offer and leave them available for counsel. That might be more satisfactory, because I appreciate he's had no chance to see it.

The Court: All right.

Direct Examination

(Continued)

By Mr. Holman:

Q. What were the excavation operations and the hand grading operations on 1068, Mr. Black?

A. With the exception of the first lateral, I staked out roughly, staked out all of the structures ahead of the hoe so they could be roughly dug out by machine excavation. [1726] The first lateral, the hoe was too far away, I had to dig those all out by hand, but with that exception all the rest of the job it was roughed out by the back hoe and finished by hand.

Q. Yes, sir. I'll ask you whether or not you did

(Testimony of James A. Black.)

the same type of fine grading, excavation finishing, with respect to 1068 that you did on 1062?

A. I had the structures roughed out a little larger with the back hoe, being more convenient to work in for ourselves and everybody else.

Q. Did you do the fine grading to the same exactitude, or differently, than you did on 1062?

A. The same type of fine grading.

Q. Now, you spoke of digging by hand because the hoe was away. Where was the hoe, do you remember?

A. If I recall right, it was on the lower end of the east turbine, about four or five miles away at the time.

Q. Can you tell me whether or not from your experience the cost of returning the hoe, that you say you dug by hand, would have been more or less than a hand excavation, as a cost item?

Mr. Olson: That's objected to as being immaterial.

Mr. Holman: It goes to our costs, your Honor.

The Court: On 1068?

Mr. Holman: I assume we have to show our costs. [1727]

Mr. Olson: I don't understand the question on 1068 is the question of what it cost Maeri. Maybe it cost him fifteen times what it should have cost him. The question is, if it should be determined that the Concrete Construction Company was at fault in not performing 1068, then it isn't what Maeri's cost is; it is what it should have reasonably cost to do that job, it seems to me.

(Testimony of James A. Black.)

The Court: Yes, I think that's true. It is a question of whether it reasonably should have cost more than the amount of the bid.

Mr. Olson: That's why we introduced testimony, among other things, that the bid was right. Remember Mr. Bufton testified that a reasonable, capable contractor could have made \$7900.00. I don't think that's binding upon Mr. Holman. He can introduce testimony if he's got it, but to go into whether or not Mr. Macri had his hoe down there two or three miles, without excavating structures, and then ask whether it is cheaper to bring it back, that is the question I'm objecting to.

Mr. Holman: I'll withdraw the question, your Honor, in view of counsel's statement, and I don't care to argue 1062 in respect to 1068 case.

Direct Examination

(Continued)

By Mr. Holman:

Q. Will you give the Court, please, to the best of your recollection, the conditions on both 1062 and 1068 with [1728] respect to sloughing of excavated quantities into the holes, after they had been dug, after they had been fine graded?

A. Well, on the—I'd say the lower south part of the job was sandy, and that would slough very bad.

Q. That's which, 1062 or 1068?

A. On both 1062, the last of 1062, and through 1068.

(Testimony of James A. Black.)

Q. Now, would that be the last of 1062 and the first of 1068, or not?

A. Yes, the last of 1062, below east turbine, and through 1068 below east turbine lateral.

Q. And what with respect to sand blowing on both of these jobs, after there had been excavation and fine grading? Did that occur?

A. It did on 1068 while I was there. It didn't blow any on 1062 that I recall.

Q. It did not on 1062?

A. Not while I was there.

Q. And you were on there, I believe you said, from November to January? A. Yes.

Mr. Holman: You may inquire.

Cross-Examination

By Mr. Olson:

Q. You went on 1062, Mr. Black, in November of 1944? A. Yes. [1729]

Q. And you fine graded, then, on 1062 until about January 31? A. Yes, about that date.

Q. Then you transferred to 1068?

A. Yes.

Q. Now, you say—did you do any fine grading on the stilling pool?

A. On the stilling pool? No.

Mr. Holman: Just a minute; which contract, counsel?

Mr. Olson: On 1062.

A. Not on the stilling pool itself.

(Testimony of James A. Black.)

Q. (By Mr. Olson): So that was done after you had left the job, then? A. Yes.

Q. So you weren't on 1062, then, clear until the end of the project? A. No.

Q. When you left there was still more excavation work and more fine grading to be done?

A. I had most all of the small structures fine graded at the time I left, with the exception of the stilling pool and the spillway.

Q. That was quite a sizeable project, wasn't it?

Mr. Holman: Just a minute. Your Honor, I think the witness has shown by his answer that he didn't grade it, and therefore it is not proper cross-examination. If [1730] he knows, why, it is all right.

Q. (By Mr. Olson): Do you know about it, the stilling pool? Did you see it? A. Yes.

Q. And the chute, I think they call it?

A. Yes.

Q. You saw that? A. Yes, I did.

Q. That's quite a sizeable project, isn't it?

A. Yes.

Q. Do you know about how long that chute was?

Mr. Holman: I still submit it is not proper cross-examination, your Honor.

The Court: If he knows about it, I think he can answer.

A. As I recall, it is about 1800 feet long.

Q. About 1800 feet long, and the stilling pool, is that located at the bottom? A. Yes.

Q. Of the chute? A. Yes.

(Testimony of James A. Black.)

Q. Can you give any approximate dimensions of that?

Mr. Holman: Same objection to all this, your Honor. It is not proper cross-examination.

The Court: The record may show the same objection. [1731]

A. No, I can't; I've forgotten.

Q. Now, you say that you fine graded to the best of your ability, but it was impossible to do a good job at that time; that's because it was in the winter, is it not, Mr. Black? A. Yes.

Mr. Holman: Just a minute. Your Honor, I object to the question as not entirely what the witness stated. Counsel put elements in that question that the witness didn't state. He said it was more difficult. I don't think the witness stated he didn't do a good job.

The Court: I'll overrule the objection. He can correct it if it doesn't represent what he testified.

(Whereupon, the reporter read the last previous question.)

A. Yes, the ground was frozen. It wasn't frozen deep enough so you could really get down and dig it. It was frozen about five inches. In most instances if you would dig the frozen ground off, take it all off, why, the structure would be too deep, so you just had to take it off in layers, and it was just impossible to do a neat job.

Q. In other words, it was just impossible to make the right elevation or sub-grades?

(Testimony of James A. Black.)

A. Without spending too much time on it, yes.

Q. And Mr. Macri told you not to spend too much time? [1732]

Mr. Holman: I submit that is not proper cross examination, your Honor. If he wants to make this his witness again——

The Court: I think it pertains to the manner of doing the work. I'll overrule the objection.

Q. (By Mr. Olson): And Mr. Macri had told you repeatedly not to take too much time in fine grading, had he not?

Mr. Holman: The same objection, your Honor. In other words, counsel in his cross-examination is not referring to any of the testimony of this gentleman on direct, at all. There was no single question, your Honor, asked this gentleman about any instructions.

The Court: You attempted to elicit from this witness that he had done this work as good as possible under the circumstances. This goes to whether he did or not. I'll overrule the objection.

(Whereupon, the reporter read the last previous question.)

A. Yes, he told me to not spend too much time, that we had to get the work done.

Q. And he also told you not to be too particular with the fine grading?

A. Well, he told me to get it down close, within possibly two or three tenths, anyway.

Q. Now, it's also a fact, is it not, Mr. Black, that

(Testimony of James A. Black.)

you [1733] just didn't have enough men to help you and get this fine grading done right, too, isn't it?

A. There was times when I didn't have enough help. Other times I had help.

Q. And it took two men and yourself from two hours to a day per structure to do the hand excavations? A. Yes.

Q. And you had—how many men did you have with you?

Mr. Holman: Your Honor, I object to this as cross-examination for the reason that plaintiff now is again going into the same proofs that he endeavored to make by this witness when he made him his witness.

The Court: Well, it would still be a question of whether it is proper cross-examination, wouldn't it? You asked him how many men he had with him, and he said two. He testified to that, didn't he?

Mr. Holman: Yes, as to one function in the incident of time, he said himself and two men.

The Court: Overrule the objection.

A. I had all the way from one to five men. I never used more than two in any one structure. Sometimes I'd have them working in three structures all at the same time.

Q. Sometimes you did what?

A. I had them working in three different structures at one time, if I had the men. [1734]

Q. Would those structures be in the same excavation? A. No, different excavations.

Q. Different excavations. Now, you say you can

(Testimony of James A. Black.)

remember some instances when the carpenters or Mr. Darcy requested you to go back and do some sub-grading, I believe you said the carpenters, and you didn't go because you were too far away and didn't have help?

A. I was short of help, yes.

Q. And you didn't have the man-power to go back and do the excavation?

A. Not at that time.

Q. You don't know, Mr. Black, I assume, if you were out ahead, how much hand excavation the carpenters themselves did in these excavations?

A. No, I don't.

Q. Now, with reference to Exhibit 23, plaintiff's Exhibit 23, you say that you never saw an excavation which was that neat?

A. No, I haven't,

Q. You think Mr. Darcy did a good job of making that?

A. Yes, I think he did.

Mr. Holman: I object to that question, your Honor, and move the answer be stricken.

The Court: Sustain the objection. I think it is immaterial. [1735]

Q. (By Mr. Olson): Now, you staked out the holes or the stations or locations of excavations on 1068?

A. I did, yes.

Q. And how much lateral clearance did you give on 1068?

A. For the hoe I gave for rough excavation two feet.

Q. Two feet from what?

A. From the concrete line.

(Testimony of James A. Black.)

Q. That's just twice as much as you were giving on 1062?

Mr. Holman: Objected to as argumentative, your Honor.

The Court: Yes, I'll sustain the objection.

Q. Well, on 1062 you gave how much, then?

A. My work was all hand excavation there.

Q. Matter of fact, Maceri told you not to go over a foot, didn't he?

Mr. Holman: Just a minute. Your Honor, I submit that's not proper cross-examination.

The Court: Overruled.

A. I don't know as he told me not to go over a foot. He told me that a foot outside of the concrete line was what I was to dig.

Q. Now on job 1068 Mr. Maceri at that time was putting the structures in and digging the excavations himself, was he? A. Yes. [1736]

Q. And what practice did he follow, then, in installing the structures?

A. They were all assembled in the job yard, hauled out on trucks, and lowered into the excavations with a boom truck.

Q. The panels, then, were assembled together in structure form? A. Yes.

Q. And then inserted in the excavations as a unit? A. Yes.

Q. Rather than panel by panel? A. Yes.

Q. Now, you say there was no sand blowing on 1062 while you were there. There again, I assume the terrain was frozen, and there wasn't any dirt blowing around?

(Testimony of James A. Black.)

A. Well, it was frozen, and there was very little wind at that time of the year there, as I recall it.

Q. Now, it is a fact, is it not, Mr. Black, that the carpenters on the Concrete Construction crew were forced to wait continuously because of the fine grading not being done on the excavations ahead of them?

A. Well, I couldn't say that they were waiting continuously while I was there. There was times they waited.

Q. Well, didn't it happen continuously throughout the time you were there, Mr. Black? [1737]

A. Over the period of time, yes, they waited different times all through my part of the work.

Q. Counsel interrogated you about this one structure that the carpenters were kept waiting for two and a half days. What I'm getting at is, that isn't the only structure where the carpenters had to wait because the fine grading wasn't done?

A. No, that wasn't the only structure.

Q. The fact is that through the entire time you were there you just didn't have enough men for fine grading to keep ahead of the carpenters, isn't that so?

A. Well, I was fairly well ahead of them most of the time, with exceptions of the fact that sometimes the fine grading wasn't just as it should have been. There may have been a few times when they had caught up to me entirely.

Q. Pardon?

A. There was a few times when they caught up

(Testimony of James A. Black.)

to me entirely, but as a rule I had structures fine graded ahead.

Q. By that you mean within two or three tenths?

A. Yes, there was times when structures was too high, and I had to go back and dig them down, and dig the curtain walls.

Q. Now, do you remember giving a statement, Mr. Black, to Mr. Darcy and Mr. M. C. Schaefer on October 25, 1946? A. Yes. [1738]

Q. I'll ask you if you did not at that time make this statement to them, in your own writing——

Mr. Holman: Just a moment. May it please the Court, I object to this as improper cross-examination, unless the witness is furnished a copy of the statement. I think it is improper for counsel to read from a statement into the record, a statement signed by this witness.

The Court: Well, perhaps you had better identify it first, as to it being signed by him, and then you can ask him concerning certain portions of it.

Mr. Olson: He may say yes, he said that. I'd just as soon put this in.

(Whereupon, written statement of James A. Black was marked plaintiff's Exhibit No. 83 for identification.)

Q. (By Mr. Olson): Showing you, Mr. Black, plaintiff's identification 83, I'll ask you, is that your signature? A. It is.

Q. And that's a statement, is it not, that you gave Mr. Darcy and Mr. M. C. Schaefer?

A. It is.

(Testimony of James A. Black.)

Q. Would you care to read it, Mr. Black?
(Counsel handed the statement to the witness).
This printing is in your handwriting, is it not?

A. Yes. [1739]

Q. In other words, this entire letter or statement was written by yourself? A. That's right.

Q. I'll ask you if you did not in this statement say "I was not allowed men enough at any time to perform this work." Well, I have to go back beyond that, to show what it was: "From the time I started fine grading and excavating for structures on 1062 I was repeatedly ordered by Mr. Maceri to not waste any time or be too particular about fine grading?"——

Mr. Holman: I object to this being read into the record; if it is going to be admitted in evidence——

Mr. Olson: Well, I offer it in evidence.

The Court: I wouldn't think it would be admissible in evidence. He may admit he said that. Overruled.

Q. (Continuing the reading) "that two or three tenths was close enough, and to not dig the holes over one foot larger than the structure, also that I was not to slope the banks, but leave them vertical. I was not allowed men enough at any time to perform this work and keep ahead of form setters working for the Concrete Construction Company. Their carpenters were forced to wait continuously." Now, did you make that statement, Mr. Black?

A. I did.

Mr. Olson: That's all. [1740]

(Testimony of James A. Black.)

Redirect Examination

By Mr. Holman:

Q. Mr. Black, which is true, what you testified on the stand, or what counsel asked you?

Mr. Olson: If the Court please, I don't think that's a proper question.

The Court: I doubt that that is proper. He can explain his statement, if he wishes. I don't think it is proper to ask a witness "When were you lying?" which is what is implied here.

Q. I didn't mean that. I mean as between that statement, is that statement inapt, or is the statement which you made on the stand inapt, with respect to the help you employed?

A. Well, the word "continuously" in that statement is really misplaced.

Q. May I see the statement?

A. They waited several times for me, or a number of times, but they weren't always waiting, and I really didn't have enough men all the way through. I said I had from one to five men, where I should have had at least a normal crew of from four to six men.

Q. Were there times when you had enough men?

A. There was a few times when I had enough men.

Q. Now, you say the word "continuously" was misplaced in this statement that counsel interrogated you about. Was that suggested to you, sir?

A. No, sir.

(Testimony of James A. Black.)

Q. Or did you place it there yourself?

A. I placed it myself.

Q. And instead of "continuously" being at that point, is there a different point it should be at, or do you say that the word "continuously" should not have been used, Mr. Black?

A. I really don't believe it should have been used.

Q. Now, Mr. Black, were you furnished a copy of that statement? A. Yes.

Q. And you had a copy of that statement when I served the subpoena upon you, sir?

A. I had it at home, yes.

Q. And is it or is it not a fact that I requested a copy of that statement then?

Mr. Olson: Your Honor, that's immaterial, whether or not he requested a copy of that statement. The record shows, your Honor, that a copy of the statement was submitted to counsel while Mr. Black was on the witness stand before. I see no reason why he should harass this witness as to whether or not he——

Mr. Holman: I'll not pursue it further, your Honor. I think it speaks for itself.

Q. (By Mr. Holman): Mr. Black, is it or is it not a fact that [1742] the carpenters within your presence actually wasted time?

Mr. Olson: That's asking for a conclusion.

Mr. Holman: It is redirect.

The Court: Well, it is a leading question.

Mr. Olson: And it is suggestive.

(Testimony of James A. Black.)

The Court: I'll sustain the objection.

Q. (By Mr. Holman): In your opinion, and from your experience, was the waiting of the carpenters necessary in the instance that you testified, when they were waiting while you were fine grading?

Mr. Olson: Now, if your Honor please, that's asking for a conclusion of this witness, as to whether or not it was necessary for these carpenters to wait. I assume he's asking him if there wasn't something else they could have been doing.

The Court: I'll sustain the objection.

Q. With the exception of the instance that you identified to me, Mr. Black, and testified about, where the carpenters waited, are you able now after counsel interrogated you to indicate other places and other structures where they waited?

Mr. Olson: That's objected to as not being proper redirect examination.

The Court: I'll overrule the objection.

A. I don't know of any particular structures.

Q. You do know about this structure I asked you about? A. Yes.

Q. And you told me about that?

Mr. Olson: That's leading.

The Court: Do you claim the privilege of cross-examining him, or is this still redirect?

Mr. Holman: Redirect, your Honor.

The Court: It is getting into cross-examination.

Q. (By Mr. Holman): Mr. Macri on 1068 to your knowledge completed the excavation, struc-

(Testimony of James A. Black.)

tures, and the pouring of the concrete and the performance of the job?

Mr. Olson: That question is objected to as being leading and suggestive.

The Court: Yes, that's very leading. Sustained.

Q. Well, what is the fact with respect to whether or not to your knowledge Mr. Macri did complete the excavation, the fine grading, and the pouring of structures? A. He did.

The Court: On 1068?

Mr. Holman: Yes.

The Court: I didn't think there was any question about that.

Mr. Holman: Well, I didn't either. That's all.

Recross-Examination

By Mr. Olson:

Q. Is it not also a fact, Mr. Black, that the men that you [1744] had to work under you doing this fine grading didn't know how to do it?

A. They were inexperienced. They didn't know what it was all about. It had to be staked perfectly.

Redirect Examination

By Mr. Holman:

Q. Well, Mr. Black, you did your best to instruct the labor that you could get? A. Yes.

Mr. Olson: Well, that question is objected to as being leading.

The Court: Well, I'll overrule the objection.

Mr. Olson: I admit he did his best with what he had to work with.

(Testimony of James A. Black.)

Q. Mr. Black, the thing I want to know is whether or not you as fine grader used the best labor you could obtain, and did the best fine grading you could; did you or didn't you? A. I did.

The Court: Any further questions? Mr. Black then will be excused from further attendance.

(Whereupon, there being no further questions, the witness was excused.)

The Court: We'll take a recess now for ten minutes.

(Short recess.)

(All parties present as before, and the trial was [1745] resumed.)

Mr. Holman: Would your Honor prefer to rule upon the letters, or continue the testimony of Mr. Macri?

The Court: Well, if you have another witness here you want to get through with, and Mr. Olson has no objection, why, the Court won't object to it.

Mr. Holman: Well, he's out.

The Court: I see. Well, you can take those up in whatever order you prefer.

Mr. Holman: I would prefer to have Mr. Macri continue to testify, your Honor, if it could be.

The Court: All right. I do think, though, that if you put Mr. Macri on again you should try to continue with him until he gets through. He's been on and off so much he'll wear his shoes out here.

Mr. Holman: That's my intention, your Honor.

SAM MACRI

a witness called on behalf of the defendants Macri, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Holman:

Q. Handing you what has been marked identification 67, Mr. Macri, I'll ask you if that was served upon you or about the date indicated, March 15, 1946? A. Yes.

Q. By the United States Government? [1746]
A. Yes.

Mr. Holman: I offer in evidence, your Honor, identification 67, notice of levy. I don't think the Court has inspected it. I may state in that connection that we have pleaded, your Honor, that that has been served upon us restraining the payment of this balance of fourteen odd hundred dollars that otherwise would have been earned on 1062, and I didn't feel yesterday, or at the time of making the motion at the end of plaintiff's case, that I should argue that, because it was not in evidence.

The Court: I see. This operates somewhat as a writ of garnishment in holding up any monies due from Mr. Macri to Mr. Schaefer; is there any question about that, the effect of it?

Mr. Olson: I don't know what it is, your Honor, but I perceive that it should be admitted in evidence, probably.

Mr. Holman: I submitted it to Mr. Schaefer, your Honor, and he said that it had not been paid, on his examination yesterday or the day before.

(Testimony of Sam Macri.)

The Court: Yes. It will be admitted. That is defendant Macri's identification 67.

(Whereupon, Defendant Macri's Exhibit No. 67 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Holman:

Q. Mr. Macri, did the use plaintiff Schaefer furnish you any schedules of operations at any time? A. No, sir.

Q. Did the use plaintiff Schaefer or any of his employees at any time furnish you with any notice of claim as to insufficient performance of excavation for structures, either as to rough excavation or as to fine grading? A. No, sir.

Q. Did you at any time receive any notification from the Bureau of Reclamation, United States Bureau of Reclamation, Department of Interior, regarding any improper excavations of any structures? I'm speaking all this time of 1062, sir.

Mr. Olson: Just a minute. That's objected to on the ground it is wholly immaterial whether the Bureau of Reclamation ever complained to Mr. Macri about the excavations, your Honor.

Mr. Holman: It is a matter of notice, your Honor, in compliance with the sub-contract. That is my purpose.

The Court: I didn't get what your purpose is.

Mr. Holman: I say, it is a matter of notice, in

(Testimony of Sam Macri.)

compliance with the requirements of the Macri-Schaefer sub-contract. I'm willing to concede that if the Bureau had notified Mr. Macri, it would be a sufficient notice, [1748] whether or not Mr. Schaefer had notified him. That's my purpose.

The Court: I see. I'll overrule the objection.

Witness: No, sir.

Q. Sir? A. No.

Q. Did you give your respective superintendents in charge of the operations on 1062 any instructions with respect to furnishing lumber without delay, for the purpose of building forms?

Mr. Olson: Just a minute. Your Honor please, that's objected to. It isn't a question of what instructions he gave his superintendents. That's asking for hearsay. The question is what did they do. If he's going to ask for a conversation it has to relate to some conversation when we're present, and he ought to do like he made me do, state when and where and in whose presence.

The Court: It seems to me that would be inadmissible with this exception, that where certain witnesses have testified with reference to instructions he gave them concerning the work, but I do not recall that there was any testimony as to instructions with reference to lumber. The objection will be sustained.

Mr. Holman: The one instance I do call your Honor's attention to was the testimony of Mr. Stickney, [1749] plaintiff's witness, that he did not have instructions.

(Testimony of Sam Macri.)

The Court: Did not have what instructions?

Mr. Holman: As to lumber.

The Court: I don't recall any testimony with reference to lumber, or testimony as to instructions given by Mr. Macri with respect to lumber.

Mr. Olson: Your Honor, in order to save time I'll withdraw the objection.

The Court: Yes, all right.

Mr. Holman: Did you, Mr. Macri? Will you read the question?

(Whereupon, the reporter read the last previous question.)

Q. The answer would be yes or no, Mr. Macri.

A. Yes.

Q. I'll ask you specifically whether or not you gave that instruction to Mr. Stickney?

Mr. Olson: I would like to have him say when and where, your Honor.

Q. First, did you give that instruction to Mr. Stickney?

A. I been giving that instruction to my superintendents.

Q. I asked if you gave it to Mr. Stickney.

A. Well, yes.

Q. Now, when and where did you give that instruction to Mr. Stickney? [1750]

A. Right after he started working on the job, I called his attention, I gave him free hands, hire, fire, and whatever you want.

Q. I'm talking about lumber.

(Testimony of Sam Macri.)

A. And on lumber, I told him give their men and try to get the list two or three days ahead, because I'm going to try to run lumber from the coast; in case they don't give you the list and it's short time, just get in the truck and go get it locally.

Q. When did you give him those instructions?

A. When he started work.

Q. And where, at Seattle, or locally?

A. Right in Sunnyside, in the office.

The Court: You're right. I recall he testified he had no instructions to buy lumber locally.

Mr. Holman: That's what I had in mind, your Honor.

Q. Did either the use plaintiff Schaefer or any of his employees at any time deliver to you any list of lumber? A. No, they didn't.

Q. Did you at any time receive any list of lumber through your own employees from the use plaintiff?

A. Only list of lumber I had from the engineer Ashley, and I told Mr. Ashley—

Q. Never mind what you told Mr. Ashley. You got it from Mr. Ashley? [1751]

A. Mr. Ashley, yes.

Q. And was that list as received filled?

A. Well, he said Mr. Darcy told him—

Q. Just a minute; you can't say what Mr. Ashley said. I say, was that list filled? Did you fill the list that was furnished? A. Yes.

Q. Was there anything unusual in that list as submitted to you through Mr. Ashley?

(Testimony of Sam Macri.)

Mr. Olson: I'm going to object, your Honor, to testifying to the contents of a written document. If it is a list I assume it must be in writing, and they should produce the document.

Q. Do you have that list, Mr. Macri?

A. I haven't got it here.

Q. Well, do you have it at all, to your knowledge, now?

A. Yes, I believe it's in the file someplace.

Q. Sir?

A. I believe it's in the file someplace.

Mr. Holman: I submit counsel is right, your Honor. It is up to me to produce the list, as better evidence.

The Court: Well, the list isn't available. I'll overrule the objection.

Q. Mr. Macri, was there anything unusual in the requirement for lumber, on that list? [1752]

Mr. Olson: Now, your Honor, that question, I don't know what it means, "anything unusual."

The Court: Is that a list submitted by——

Mr. Olson: It is a list given to him by his superintendent, Mr. Ashley.

Mr. Holman: No, a list he says given by Mr. Darcy to Mr. Ashley, and by Mr. Ashley to him.

Mr. Olson: Now he says was there anything unusual on it.

The Court: Well, I don't know what that would be without having him answer.

Witness: Yes, there was flooring; they asked for some flooring.

(Testimony of Sam Macri.)

Q. Flooring? A. Flooring, yes.

Q. For what purpose? Did they indicate on the list?

A. Well, this particular lumber was to be used on the stilling pool and chute, and they asked for flooring, so I went ahead and tried to get it, but I sure done my best to get it.

Q. Did you get flooring?

A. Yes, I got flooring.

Q. And did you furnish flooring?

A. Yes, and at that time flooring was worse than gold, in those days. [1753]

Q. I don't get it.

The Court: Hard to get.

Q. What do you mean by "worse than gold"?

A. Well, you know, during the war, flooring was used for more essential jobs, and everything else; it was hard to get it.

Q. Still you got it and you furnished it, did you?

A. I got it.

Q. I'll ask you, Mr. Macri, whether in each instance of any report to you for delivery of lumber from Seattle, you did furnish it—did you furnish it? A. Lumber?

Q. Yes, sir. A. Yes, I did.

Q. And I'll ask you whether or not in the acquiring and delivery of that lumber you selected any lower grade of lumber than could be acquired on the market? In other words, did you buy second rate lumber, or not? A. No, sir.

(Testimony of Sam Macri.)

Q. Did you at any instance, at any time, Mr. Macri, buy any second-hand lumber, to your knowledge?

A. Not in my knowledge.

Q. Sir?

A. Not in my knowledge.

Q. I'll ask you whether or not at any time after lumber had [1754] been furnished you received any notice in writing or otherwise within ten days claiming that such lumber was defective?

A. Never.

Q. Or unfit for use?

A. No, sir.

Q. And when was the first time that you received any writing from the use plaintiff with respect to any claim of insufficient lumber?

A. I never had any writing as far as lumber is concerned, not sufficient.

Q. Did you at any time during the progress of the job?

Mr. Olson: He just got through saying he never did.

Mr. Holman: Well, then, all right, I'll strike the question, having been answered, "never" being a long time. You may inquire.

Cross-Examination

By Mr. Olson:

Q. Mr. Macri, you just got through stating that you never got a notice within ten days about lumber being defective. Do you remember testifying that?

A. Yes, sir.

Q. That's ten days from when?

A. I never had any written notice any time.

(Testimony of Sam Macri.)

Q. Never had any what? [1755]

A. Never had any written notice any time, from Schaefer.

Q. And you never did furnish any second-hand lumber? A. Not what I know.

Q. How about this lumber here, plaintiff's Exhibit 29? Did you furnish this lumber?

A. You mean that particular lumber?

Q. I mean this particular lumber that I'm showing you right here, plaintiff's Exhibit 29.

A. Well, you mean the way she is now?

Q. No; I mean did you furnish Concrete Construction Company this lumber?

A. Well, I can't tell you now, because I don't know where they take that lumber.

Q. Pardon?

A. I can't tell you, because I don't know where that lumber came from.

Q. Well, did you furnish them any lumber like this?

A. The lumber that I furnished was lumber that come in from the mill.

Q. You never furnished them any used lumber?

A. Not what I know.

Q. Well, would you know about it?

A. Probably I would, if I did.

Q. You don't know anything about this lumber that had been used in concrete before, that you furnished? [1756]

A. I don't recall there was any used lumber over there.

(Testimony of Sam Macri.)

Q. Did you ever get down to the yard on the Roza Project, Mr. Macri? A. Yes.

Q. Did you ever see any of that lumber down there?

A. Oh, I see a lot of that pile of lumber stuck up over there, a lot of lumber. I saw a lot of lumber over there when they remodel that partition, on the yard, you know, sometimes when they remodel some of their sections.

Q. My question is, did you ever see any of this type of lumber, I mean of the type of Exhibit 29, in the yard down there?

A. I just got through saying I saw some of that lumber when they took them out of that old partition for remodel.

Q. Then you did see some of that lumber?

A. That's the same lumber they used themselves, that they bring from the field to the yard.

Q. Some that they had already used?

A. Yes.

Q. Did you ever see any lumber like plaintiff's 29 in the stock piles down there on the Roza Project? A. No, I didn't.

Q. Now, you say that there was no notice ever given you of poor excavations. You were out on the project, were you not, Mr. Macri? [1757]

A. Yes.

Q. And you saw these excavations and the way they were, did you not?

A. Yes, I saw them there excavations.

(Testimony of Sam Macri.)

Q. So you already knew everything about anybody could write you about?

A. What do you mean by that?

Q. I mean that you actually saw these excavations out on the field.

A. Well, I saw, when I went over there with a man to measure.

Q. How often were you out on the project?

A. Oh, practically once a week.

Q. Practically once a week?

A. Practically; sometimes less.

Q. Sometimes twice a week?

A. I say practically once a week.

Q. And you went out on the field——

A. Usually with the superintendent or the man in charge.

Q. ——and saw these excavations?

A. I looked some over.

Q. And you saw that the walls were vertical?

A. Not all.

Q. Pardon? A. Not all.

Q. Not all? [1758] A. No.

Q. You also saw, did you not, Mr. Macri, saw the carpenters doing digging? A. No.

Q. Mr. Schaefer's carpenters? A. No.

Q. You had superintendents on this job, did you not? A. Of course.

Q. And how many superintendents did you have on this job?

A. Well, an engineer or superintendent always was on the job.

(Testimony of Sam Macri.)

Q. Well, how many did you have, all throughout the job?

A. Well, all through the job, you mean?

Q. All right; your first was Mr. Staples?

A. First was Mr. Staples, yes.

Q. How long was he there?

A. He was there until Mr. Ashley went in.

Q. He was there until Mr. Ashley came on?

A. Yes.

Q. All right.

A. And of course, Mr. Ashley is an engineer, and everything else, and Mr. Ashley wanted to come back to Seattle, and Mr. Stickney went in.

Q. That's three.

A. And then Mr. Stickney hire Mr. Black.

Q. That's four. [1759]

A. For helping, he's supposed to be an engineer, and Mr. King, I hired myself, and he's an engineer.

Q. Mr. King hired himself?

A. I hired him.

Q. So that's five of them you had on this job?

A. Yes.

Q. And one or the other of them were on the job all the time? A. Yes.

Q. Actually out in the field and seeing what was going on?

A. That's what they were hired for.

Q. That's what they were hired for?

A. That's right.

Q. Now, these excavations that you saw, you say you checked 75 of them? A. Yes, sir.

(Testimony of Sam Macri.)

Q. And do you state, Mr. Macri, that the banks were sloped to a one to one slope?

A. I state Mr. Klugg and Mr. Mercelle wanted to measure.

Q. That's not the question, Mr. Macri. Were they to a one to one slope?

A. I never put a level to find out if they were a one to one slope, but they were a slope, yes. This one to one slope is practically a regular highway, when you want to make it that way, for looks, nothing else. [1760]

Q. You know what a one to one slope is?

A. Yes, I do.

Q. A 45 degree angle?

A. Matter of fact, one to one is a regular highway shoulder.

Q. All right; were these excavations, the banks, sloped to a one to one slope?

A. Some of them were sloped. Now, I can't swear one to one, because I never put a level to see if they're a one to one, but when we dig with a hoe, it stands to reason always got to have some kind of slope. You never can cut right straight down. The bucket is dragging.

Q. You were to do the excavations, were you not, Mr. Macri? A. Yes.

Q. That wasn't any part of the Concrete Construction Company's work, was it?

A. No, I agreed to do it.

Q. Pardon? A. I agreed to do it.

(Testimony of Sam Macri.)

Q. Now, do I understand that you don't now know whether the banks were sloped to a one to one slope, or approximately so, or not?

A. I say some of them were, some were less, some were more; I can't swear exactly now. You want me to answer a question of one to one; I can't swear that kind of stuff.

Q. You remember when your deposition was taken over in [1761] Seattle, do you not, Mr. Macri?

A. Yes.

Q. Isn't it a fact that you testified over in Seattle that every one of these excavations were excavated a foot out from the neat line of concrete at the foundation of the structure, and that every bank with the exception of one was sloped to a one to one slope?

A. At the time I don't recall, the first time I ever heard this one to one slope.

Q. Did you so testify?

A. I testified that all was bigger, plenty big enough to do the work, and some was sloped, the way I understood. Matter of fact, I don't know what it was, this one to one slope, then.

Q. Nobody's asked you a question now. I'm reading from page 10 of your deposition, Mr. Macri.

“Question: Mr. Macri, did you on any of the excavations excavate out so those excavations at the foundation was a foot out from the structure to be installed, and the wall from the bottom of the excavation to the surface of the ground was on a slope of one to one?

“Answer: We make each one that way.

(Testimony of Sam Macri.)

“Question: You made every one on a one to one slope?

“Answer: Yes; practically every one.

“Question: Practically every one?

“Answer: Yes. I never watched one by one, but the superintendent was there and the inspector on the [1762] job should know about it, I guess.”
You so testified, Mr. Macri? A. Correct.

Q. And is that a fact, that you did excavate them all out one foot and on a one to one slope?

A. As far as clearance, it was always one foot or more. What I meant there, when you put the hoe bucket on top, it's always bound to slope more or less.

Q. Always bound to slope more or less?

A. Yes.

Q. That's on one side?

A. All sides. If you know what a hoe bucket is, you can't help; they got to be sloped when you pull the bucket out.

Q. Reading from page 16, line 21, of your deposition:

“Question: Then it is your position, is it, Mr. Macri, that as far as any of the excavations were concerned which you yourself inspected, they were all excavated in such a manner that there was a hole and a space at least one foot horizontal out from the form to be installed at that time, and that the outside wall from the bottom of the excavation to the surface of the ground was on a slope of one foot horizontal to each foot perpendicular?

(Testimony of Sam Macri.)

“Mr. Holman: I object to that question as impertinent and improper in its form. You have asked as to a fact, and now you are asking as to his position. I advise the [1763] witness not to answer the question. Refuse to answer the question.

“Question: Do you refuse to answer the question?

“Mr. Holman: He does. We will testify to facts. If you will change it to ask for facts, we will answer.

“Mr. Olson: I think that is playing on words, but I will rephrase the question.

“Question: Is it your testimony——

“Mr. Holman: The same objection, right now.

“Mr. Olson: And you advise him not to answer the same question?

“Mr. Holman: Because he has already testified.

“Mr. Olson: Do you refuse to answer the question?

“Mr. Holman: He does. You can ask for any fact you want.

“Question: Mr. Macri, were all of those excavations which you examined excavated in such a manner that there was a horizontal space of at least one foot from the outside of the structure to be inserted, and the outside wall at the foundation of the structure?

“Mr. Holman: I object to that question for the reason that the plans and specifications control, therefore it is immaterial—but go ahead and answer the question.

(Testimony of Sam Maceri.)

“Answer: Yes. It was all but one which was in the rough. There was plenty of room to put the form in, and Schaefer called attention to that.

“Question: All of them that you examined——

“Answer: Yes, sir, all but one. That was rough.

“Question: ——were excavated so that there was at least a foot horizontal from where the [1764] structure would be to the outside wall at the foundation of the structure?

“Mr. Holman: The same objection.

“Answer: Every one was more than a foot out.

“Question: The outside wall on each of the excavations you examined were they on a slope of at least one foot horizontal to the outside for each foot vertical up to the surface?

“Mr. Holman: I object to that question as being meaningless. The excavation does not have a wall.

“Mr. Olson: I never saw one that did not have one.

“Mr. Holman: An excavation?

“Mr. Olson: I am talking about the outside wall of the excavation. If you can have a hole without a wall, I want to see one.

“Answer: It was above the ground, so how can you get a slope? You just make a big hole so they can set the form. Some of the structures were above the ground.

“Question: I am speaking of the surface of the ground, from the bottom of the excavation, from the bottom of the excavation to the surface of the ground, was there a slope there of one to one? That is, one foot horizontal for each foot vertical?

(Testimony of Sam Macri.)

“Mr. Holman: It is immaterial as long as he complied with the specifications.

“Answer: I think there was a slope on each one.

“Question: Was there at least that much slope?

“Answer: Why, sure. There was some bigger ones where we left the slope.

“Question: I am not asking what you had to do. What did [1765] you see there?

“Answer: Some was two and a half feet deep, and you can see a little hole. Some was as big as that table. The structures were all straight up and down. You mean the completed wall.

“Question: I am talking about the excavations which you made.

“Answer: There was a step-up and the slope was that way. We have to slope them.

“Question: Answer my question. Don't say what had to be done. I want to know what was there. I ask you again.

“Answer: Like it was on the plans.

“Question: Never mind the plans. Tell me what you saw on the job when you inspected it. Were the outside slopes of these excavations—were they vertical when you saw them, or were they on some slope?

“Answer: They are a different type. We make them the way they are shown on the plans.

“Question: The ones you saw were some of the outside walls vertical up and down?

“Answer: It was exactly the way the blueprints called for.

(Testimony of Sam Macri.)

"Mr. Olson: We ask that that be stricken.

"Mr. Holman: I resist, on the ground it is responsive.

"Mr. Brown: It seems to me that what he was required to do was according to the plans and specifications, and not what is in the mind of the counsel, what he was required to do. The issue we are trying to arrive at is whether he did it according to the plans and specifications.

"Mr. Olson: And we will not [1766] find out by this witness saying he did it by the plans and specifications.

"Mr. Holman: You will find out facts if you ask anything but catch questions. I will not let you ask catch questions, and if you do I will stop it.

"Mr. Olson: No catch question have been asked.

"Mr. Holman: You are talking about the wall of an excavation. If that is not a catch question, I don't know one."

Mr. Hawkins: I don't see what relevancy reading this deposition has at this time. If this is cross-examination it is certainly far afield of anything that has been testified to today. If he is reading it into the record for any purpose, as the rule says, it should have been done in his case in chief, not at this time. I can't see any purpose in reciting the wrangle counsel had when they took this deposition.

The Court: I thought he was going to get down to some statement Mr. Macri made about excavations.

(Testimony of Sam Macri.)

Mr. Olson: Well, I'm getting to it, your Honor, but it took about fifteen pages to get there.

The Court: All right, if that is what you had in mind.

Q. (Continuing the quotation from the Macri deposition.)

"Question: Mr. Macri, they object to using the word 'wall.' By that term I mean the outside of the excavation. [1767] What do you call that, so we will not have any question about it? What do you call the outside of the excavation?

"Answer: When we dig a structure I call it digging the hole.

"Question: When you dig the hole in the ground what do you call the outside of it?

"Answer: We just call it a hole. We don't call it anything.

"Question: You wouldn't know what to call it?

"Mr. Holman: He didn't say that.

"Question: What do you call it?

"Answer: We call it a structure.

"Answer: Yes, sir.

"Question: The excavation you made you called a structure?

"Answer: Yes, sir. And it is a wall when we put in the concrete wall.

"Question: You did not place the concrete?

"Answer: No.

"Question: That was up to Mr. Schaefer?

"Answer: Yes, sir.

(Testimony of Sam Macri.)

“Question: You were through with the hole and away from it before the form was placed or the concrete was poured?

“Answer: What do you mean by away?

“Answer: You were gone and moved?

“Answer: Yes.

“Question: Now, reading Specification No. 1062, Page 23, beginning with the last word on the sixth line from the top: ‘Except for the limitations described above, excavations for structures will in general be measured for payment to lateral dimensions of one foot outside of the foundation of the structure, and to a slope of one to one for common excavation.’ Do you—

“Mr. Holman: Finish the sentence. [1768] You can’t stop in the middle of a sentence.

“Mr. Olson: Will you let me examine this witness?

“Mr. Holman: I will not let you trick him.

“Mr. Olson: Don’t anticipate somebody will not be right about something.

“Mr. Holman: Go ahead.

“Question: Have you in mind what I have read, Mr. Macri? I will read it again. ‘Except for the limitations described above, excavations for structures will in general be measured for payment to lateral dimensions of one foot outside of the foundation of the structure.’ Now, that means one foot horizontal at the foundation or the base of the bottom of the excavation, is that correct?

(Testimony of Sam Macri.)

“Mr. Holman: I advise you to refuse to answer. It speaks for itself. Refuse to answer. The question is immaterial and irrelevant and not the best evidence. The specifications control and there are the words.

“Question: Do you refuse to answer?

“Mr. Holman: He does.

“Question: Is it a fact that each of the excavations that you inspected with reference to the foundation was excavated in accordance with that part of Specification 1062 which I just read?

“Answer: Yes, sir. Every one was right.

“Question: Was each one dug in accordance with that part of the specifications?

“Answer: Yes, sir; all but one that I told you before; the rough one was a little wide.

“Question: When you say in accordance [1769] with the specifications, is it in accordance with that part of the specifications which I just read?

“Mr. Holman: I object to that question because there is a proviso there.

“Mr. Bullivant: I do not think counsel should constantly interrupt in light of the stipulation which was made in regard to relevancy, when that objection can be made at the time of trial. It interrupts this proceeding, and in the light of the further fact counsel's question was limited to particular language of the specifications.

“Mr. Holman: That is all true, but the last question was not according to that.

(Testimony of Sam Macri.)

“Mr. Brown: I want to join in Mr. Holman’s objection to the form of the question. It is the form of the question I am objecting to, and that is one thing that has to be done at this time.

“Mr. Olson: What objection are you making to the form of the question which I just asked?

“Mr. Holman: I am satisfied with my objection.

“Mr. Brown: I join in Mr. Holman’s objection to the form of the question. The part of the specifications you read applies to how much payment the Government will allow the contractor, and has nothing to do with the relationship between this contractor and the sub-contractor.

“Mr. Holman: I join in that objection.

“Question: Now, Mr. Macri, each excavation which you inspected, with the exception of one, was so excavated [1770] that the foundation of the excavation had a lateral dimension of one foot outside the foundation of the structure, or of the form to be inserted?

“Mr. Holman: I object to your question, on the ground it is immaterial and outside the issues.

“Question: Will you answer the question?

“The Witness: Shall I answer?

“Mr. Holman: All right.

“Answer: It was a foot or more than a foot.

“Question: And the outside slopes of those excavations, still excepting this one, that you inspected, were on a slope of at least one to one? Is that true?

“Mr. Holman: The same objection.

(Testimony of Sam Macri.)

“Answer: I don’t know if I shall take the plans and look at them.

“Question: Is that a true statement or it not a true statement?

“Answer: I would have to look at—as I tell you before, every one was a little different, and they would have to be sloped.

“Question: And were they on a slope of at least one to one?

“Mr. Helman: I object as immaterial.

“Question: They either were or they were not?

“Mr. Holman: If you ask if they were sloped so the bank would stand, I do not object.

“Mr. Olson: We are entitled to try this case on our own theory. We are willing to rest on our opinion whether the questions are material or not. Read the question.

“(The reporter read last several questions.)

“There has been so much interruption——

“Mr. Holman: Just a minute. [1771] He will answer.

“Mr. Olson: Just a minute, gentlemen. I don’t want this deposition to come out with a question and then four or five pages of argument in between the question and the answer. I will rephrase the question.

“Question: Were each of the outside surfaces of the excavations you examined, with the exception of that one, on a slope of at least one to one?

(Testimony of Sam Macri.)

“Mr. Holman: The same objection I made to the previous question. You may answer, if you know.

“Answer: Yes, sir; they were all sloped. They were all right.

“Question: Is your answer to my last question ‘yes’?

“Answer: Yes.”

(End of quotation.)

Q. (By Mr. Olson): Did you so testify, Mr. Macri? A. You mean——

Q. I asked you if you so testified, in accordance with the questions and answers I just read?

A. Must have did, if it is write over there.

Q. Pardon? A. Yes, I testified.

Q. And do you say then, Mr. Macri, that each of these excavations, that the bank opposite which an intervening form had to be inserted, between the concrete, was on a slope of one foot to one foot, or approximately so?

A. I never tell you any time one to one. That's the first time I heard of that one to one slope, but I told you [1772] practically every one was a slope.

Q. You say now is the first time you ever heard about a one to one slope?

A. That day you mention about it over there, but I told you practically they are more or less all sloped, but I don't say one to one.

Q. When was the first time you heard anything about a one to one slope?

(Testimony of Sam Macri.)

A. That time you bring it up over in Mr. Holman's office.

Q. You mean when we took this deposition?

A. That's the first time I heard of this one to one, far as this case is concerned.

A. That's the first time you heard of this one to one slope? A. Yes, sir.

Q. You never knew anything about it when you were performing the contract?

A. Nobody ever mentioned it's a one to one slope to me before.

Q. But you do say, do you, Mr. Macri, that each one of these excavations out here, that the banks were sloped one to one?

A. I'll say more or less, they all had some slope, yes.

Q. Some slope; did they have that much, or were they practically vertical?

A. I won't swear for anybody else until I measure and make [1773] sure.

Q. You say you can't say for sure whether they were practically vertical?

A. Every one had some kind of slope, because you can't cut those straight with a hoe.

Q. And that's why you say there was some slope, because a hoe won't dig them——

A. Not a structure; you can dig a narrow ditch, but not a structure, because you got the four walls in a structure.

Q. You made no measurements of any of these excavations yourself, did you, Mr. Macri?

A. No; I never said I did.

(Testimony of Sam Macri.)

Q. And you have no measurements on any of these structure excavations?

A. You mean about the width, the length, or how?

Q. You have no measurements yourself of these excavations that were made out on 1062?

A. No, I haven't got any measurements.

Q. Now, you were to furnish the lumber on this job, that's correct, is it not? A. Yes, sir.

Q. And you say that the only list of lumber that was ever given to you was one given by Mr. Ashley for the stilling pool and chute?

A. That's the only list I have. [1774]

Q. That's the only list you ever had; when did you get that?

A. Oh, it was during the summer.

Q. It was during June, wasn't it, 1944?

A. No, I think it was after June.

Q. Pardon?

A. No, I think it was later on. I can't say for sure about that.

Q. Did Mr. Staples ever give you the list for the chute lumber and stilling pool lumber that was given to him in June, 1944? A. Mr. Staples?

Q. Yes.

A. No, Mr. Staples never gave me any.

Q. He didn't give it to you? A. No.

Q. Now, do you know when Mr. Ashley gave you any list, then?

A. Yes, I recall Mr. Ashley said he got it through Darcy, I understand it, so Ashley said.

(Testimony of Sam Macri.)

Q. Which list did Ashley send you, the first, second, third or fourth list he gave Ashley?

Mr. Holman: I object, that is improper cross-examination.

The Court: I'll sustain the objection unless he knows there was more than one list furnished by Darcy.

Q. Well, can you tell me whether there was, then, Mr. Macri? [1775]

A. Well, that's the only list I have for this stilling pool.

Q. When did you get it?

A. Well, it was during when Ashley was over there; I don't know if it was July or August.

Q. Mr. Ashley went there on the 22nd of June, did he—or do you know?

A. I'll have to look up that; I can't say for sure.

Q. Mr. Staples left, didn't he, on the 22nd of June, 1944? A. Yes.

Q. And Mr. Ashley went on right after him, didn't he?

A. Yes, he took Staples' place.

Q. When did you furnish that lumber for the stilling pool and chute?

A. I think it was during the first part of February, if I remember right.

Q. Yes, 1945, that's right, isn't it?

A. Yes, because Mr. Darcy told me, I asked him——

Q. Never mind.

(Testimony of Sam Macri.)

Mr. Holman: I submit he has a right to finish his answer.

The Court: He can answer the question and stop at that.

Q. This lumber you furnished was in February, 1945, for the stilling pool and chute?

A. That's the flooring, yes. [1776]

Q. That's the rest of the lumber too?

A. It was all special lumber he wanted.

Q. And that was delivered in February, 1945?

A. That's when it was delivered, in February, the first part of February.

Q. All right; and do you know about what day of February it was, 1945, that you furnished that lumber?

A. It was the first part of February.

Q. I'll ask you if it wasn't the 15th of February, 1945?

A. No, it was earlier than that.

Q. And when was your contract supposed to be completed on 1062?

A. Well, we had so many days from the notice we received. I'll have to look up and see about it.

Q. Well, it was February 8, 1945, wasn't it, that the work was all supposed to be done?

A. If that's what the contract calls, it must be correct.

Q. Well, you don't remember? Is that right?

A. Not unless I look, I don't know.

Q. Now, getting back, Mr. Macri, to the first part of your testimony, when you first went on the

(Testimony of Sam Macri.)

stand, you say you've been in the construction business for twenty-six years. Is that the last twenty-six years?

A. What do you mean by that?

Q. Well, I mean the twenty-six years which has been the last [1777] twenty six years' to pass.

A. I imagine so.

Q. Well, Mr. Macri, you should know. You say you've been in the general construction business for twenty-six years?

A. I say around twenty-six years.

Q. Now, do you mean the last twenty-six years?

A. Naturally I don't mean in the future.

The Court: Do you mean whether it is continuously, or whether there was a break in it? Is that what you want to know?

Q. Have you been in general construction business continuously, for the last twenty-six years?

A. Well, I started around twenty-six years ago.

Q. And have you been continuously at it ever since?

A. Well, I didn't work all the time, if that's what you mean.

Q. Well, did you engage in any other business during the last twenty-six years, other than the construction business?

A. Oh, yes; well, I did construction business; I had a tailor shop too.

Q. Had a what?

A. I was in tailor business too, while I did the construction business.

(Testimony of Sam Macri.)

The Court: Is that tailor? A. Yes. [1778]

Q. Oh, you had a tailor shop, you say?

A. Sure.

Q. Did you work in the tailor shop?

A. That's my main trade, designing and tailoring.

Q. Pardon?

A. That was my main trade, to start with.

Q. Your main trade to start with was a tailor?

A. Yes.

Q. When were you in the tailor business?

A. Oh, I started in 1912—no, before that.

Q. I mean when last were you in the tailor business, have a tailor shop?

A. Oh, I think I sold out, if I remember right it was after the World War, shortly after the World War.

Q. In the 1920's, sometime?

A. Around then, about 1925.

Q. Have you engaged in any other business during this last twenty-six year period? A. No.

Q. No other business?

A. I don't recall any other business beside that.

Q. You say you don't recall any other business?

A. No, I don't recall any other business.

Q. Now, when Mr. Staples or after Mr. Staples wrote to Mr. Schaefer, you say Mr. Schaefer called you on the telephone [1779] about sub-contracting a part of 1062? A. Yes.

Q. And then he came over to Seattle and met you, didn't he? A. Yes.

(Testimony of Sam Macri.)

Q. And there wasn't any contract signed that day? A. No.

Q. But he took the specifications home with him?

A. Yes, he took the plans and specifications.

Q. And did I understand you to say that he didn't have the structure lay-out plan?

A. No, I didn't have him.

Q. Pardon? A. I didn't have him, no.

Q. And you bid on this job without looking at the structure lay-out plans yourself?

A. That's all we got to bid on.

Q. What?

A. Just that plans and specifications. There isn't anything else when you bid on a job. That's all we got to go by, to bid on a job.

Q. Handing you plaintiff's Exhibit 12, Mr. Macri, didn't you have that when you bid on this job 1062? A. No, sir.

Q. Didn't have it at all?

A. No, sir; this Bureau of Reclamation supply those afterwards.

Q. How could you tell what you were going to build?

A. Well, we just go by those drawings and the unit.

Q. Well, show me on Exhibit 3, Mr. Macri, a diagram of the type of structures that you were bidding on for 1062, concrete structures.

A. Well, we bid on this unit here.

(Testimony of Sam Macri.)

Q. Show me on there the type of concrete structure that you were going to, that you were bidding on, to construct.

A. The type?

Q. Yes.

A. Well, they give you some idea here, just give you an idea, when you bid on a job. That's all it amounts to; you can tell the concrete, that's all you go by.

Q. Show me what page, so I can refer to it.

A. Well, you got this, and they show you the stilling pool and some of the concrete; that's all they give to you when you bid on a job.

Q. You're referring to drawing number 33?

A. Yes, and some structure detail here some place, and then they give you yardage of concrete. That's all we got to go by to bid on.

Q. You don't have the structure lay-out plans then?

A. No, sir.

Q. All right; now, Mr. Schaefer then came back at a later [1781] date?

A. Yes.

Q. And met with you again?

A. Yes.

Q. And is it this second meeting that you arrived at this figure of \$26.00 per cubic yard?

A. Yes, when he come back.

Q. That's the date you arrived at the figure?

A. Yes.

Q. And was the contract prepared that day?

A. I think that contract was prepared the same day.

Q. Did I understand you to say that Mr. Bill Schaefer was along then, too?

(Testimony of Sam Macri.)

A. As I recall, Bill Schaefer was the first and second time with his brother.

Q. Well, was Mr. Bill Schaefer there when the contract was signed?

A. My mind isn't fresh enough for that.

The Court: I couldn't hear that.

A. My mind isn't fresh enough on his brother over there when we signed the contract.

Q. Well, I understood you to say on direct examination that he was there; if you don't remember, say so.

A. I know his brother came in the first and second time, when he come in first and took the plans and specifications. [1782]

Q. That's the first time?

A. That's the first time, yes. I think his brother was with him the second time, with him, too, when we talked about the price.

Q. Bill Schaefer was there the second time, when you talked about the price, then?

A. Yes, seems like he was.

Q. Now, was he there when the contract was signed?

A. Well, I don't recall, now, about the contract, because we went up to the other office to draw that contract. Mr. Schaefer was over there and we went over there to prepare that contract.

Q. Mr. Schaefer wasn't there when you drew the contract, was he?

(Testimony of Sam Macri.)

A. Of course he was over there; he suggest everything; we both got together and say how you want to have it done.

Q. Well, you had the contract all prepared before Mr. Schaefer even saw it, didn't you?

A. No, not the first one, 1062. He was over there himself and dictate himself how he wanted to word it.

Q. Where was the contract signed on 1062?

A. I think it was signed right in the office over there, in the Stadium Home office.

Q. Isn't it a fact, Mr. Macri, that the contract on 1062 was signed out at your home? [1783]

A. No, in reverse. That's 1068 signed at my home.

Q. Do you remember when you came over to Yakima after 1062 contract was signed?

A. I come in Yakima.

Q. Yes; how soon did you come over to Yakima after signing contract 1062?

A. Well, I can't remember how soon it was.

Q. Don't you remember, Mr. Macri, signing this contract out at your home and then the next day that you rode over to Yakima with Mr. Schaefer?

A. That's the 1068 contract.

Q. No, on 1062.

A. No, sir, it was on 1068. Matter of fact, they got this on writing over there. He say if I want to go on the field job I have to pay the plane, and I told him I would let him know, so he come over,

(Testimony of Sam Macri.)

and that was signed at the house. if I remember right, I think it was on Sunday, but that was 1068.

Q. You say the contract on 1068 was signed on Sunday?

A. When he come in the house if I remember right it was on Sunday.

Q. So that 1068 contract was actually signed on Sunday?

A. I don't know if the contract was signed on Sunday, but I say, when he came in over there it was on Sunday.

Q. Well, is that when you signed the contract?

A. Or Saturday; I don't remember now. I know if it is when we're talking in the house.

Q. Well, you said it was 1068 signed at the house?

A. Yes, that's not 1062; it is 1068.

Q. And that was on Sunday?

A. Well, if I recall right it was on Sunday, either Saturday or Sunday.

Q. Well, was it Saturday or Sunday?

A. I think maybe it was—it seemed like it was on Sunday to me.

The Court: Well, perhaps we had better stop there and adjourn until tomorrow morning at 10 o'clock.

(Whereupon, the Court took a recess in this cause until Friday, March 14, 1947, at 10 o'clock a.m.)

(Testimony of Sam Macri.)

Yakima, Washington, Friday, March 14, 1947
10 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

Cross-Examination
(Continued)

By Mr. Olson:

Q. Mr. Macri, did you yourself have charge of sending the lumber to the job on 1062?

A. Well, charge in which way?

Q. Well, were you the one that would order the lumber and direct it be sent over, or did somebody do that for you?

A. Oh, when we got the order, why, there was a man on the job [1785] who take care of that.

Q. Well, somebody else did it, then?

A. Well, under my direction, yes.

Q. Your answer is yes, that somebody else did send the lumber over, besides yourself?

The Court: Under his direction.

Q. Did you or did you not, then, Mr. Macri, see the lumber that went over to 1062?

A. Well, when we ordered it through the mills, we just put an order on the mill and the trucks would deliver from the mill, and naturally I don't see it, no.

Q. So that you yourself did not personally see the lumber that went over?

A. We just put an order and deliver when we order the lumber.

(Testimony of Sam Macri.)

Q. Just answer the question; you didn't see it, then?

A. Some I did see, what we took from those jobs.

Q. And where did you see it?

A. Stock pile on the jobs, that we would use from those jobs.

Q. So that except for the lumber that you would see down on the stockpile on the job, you saw no other lumber?

A. We order from the mill, and the sawmill would deliver either from their trucks or some other trucks.

Q. Now, you say you told Mr. Stickney when he went on the job that if he ran out of lumber, to buy some locally?

A. Yes, sir. [1786]

Q. Now, isn't it a fact, Mr. Macri, that about September 9, 1944, you received a 'phone call from Mr. Stickney in which he advised you that a salesman from the lumber company at Klickitat was on the job, and he'd offered to ship you and deliver on the job ship-lap and two by fours, and that you told Mr. Stickney if there's any lumber to be gotten that you'd get it over in Seattle?

A. Mr. Stickney call up once and he said those people getting a little short on lumber now. I say "All right, we'll have a load delivered to them right away, but if they do need it short, why, see they get them over there locally."

Q. Isn't it a fact, Mr. Stickney called you up and made this statement to you that I just read,

(Testimony of Sam Macri.)

that there was a man—or just recited to you—that there was a salesman there from the Klickitat Lumber Company—— A. Which lumber?

Q. Klickitat. A. Klickitat?

Q. Yes. A. I never heard that name.

Q. ——and that you told him not to buy any locally; if there was any lumber gotten you would get it in Seattle?

A. No, sir; my order to everyone in charge was if you see they do run short of lumber, just see they get it over there. [1787]

The Court: Just answer the questions, Mr. Macri. You can answer that yes or no.

Q. You did not say that to Mr. Stickney?

A. No, sir.

Q. Now, as I understand from your testimony to Mr. Holman, you were on the job and met Mr. Schaefer out on the job some time in April?

A. Yes.

Q. And you think that was about the 20th of April; did I understand that correctly?

A. Around the neighborhood.

Q. Pardon?

A. Around the neighborhood; I don't mark the date, of course.

Q. Well, did you estimate it or give your best recollection as about April 20, the first time you met Mr. Matt Schaefer out on the job, in the field?

A. I said William Schaefer, not Matt Schaefer.

Q. Oh, you didn't meet Matt Schaefer about April 20, then? A. No, sir.

(Testimony of Sam Macri.)

Q. When did you first meet Matt Schaefer out on the job? A. That was on the 29th.

Q. On the 29th of April? A. Yes.

Q. That's the first time you met Matt Schaefer out on the job? A. On the field, yes. [1788]

Q. And was that a pre-arranged meeting?

A. Not as far as I know.

Q. Isn't it a fact that Mr. Staples, your then foreman, called you from your Sunnyside office, called you in Yakima and told you that if you didn't come down there that the Construction Company was going to pull off the job?

A. No, sir, Mr. Staples never tell me that.

Q. Pardon?

A. Mr. Staples never tell me that.

Q. Well, then, you state that you just happened to meet Mr. Schaefer down there on the 29th of April?

A. Well, that part of April I was quite a bit here in Yakima and if I recall right, Mr. Staples called me and said Schaefer's on the job, so I went over, and when I got in the office they told me Mr. Schaefer he was on the job, and I was looking for him.

Q. Then Mr. Staples did call you?

A. In Yakima.

Q. Yes. I say, Mr. Staples in Sunnyside called you in Yakima and told you Mr. Schaefer was on the job and wanted to see you?

A. If I recall right I think that's correct.

(Testimony of Sam Macri.)

Q. And he also told you if you didn't get down there Mr. Schaefer was going to pull his men off and go home? [1789] A. No, sir.

Q. Then you did go down, then, on the job, pursuant to that 'phone call, and met Mr. Schaefer?

A. I would go on the job just the same, because I was living in Yakima then.

Q. Now, relate just as nearly as you can, Mr. Macri, and slowly, just what was said on that date.

A. Well, when I went over there, in fact, when I went in the office, I sent a truck and driver to get hold of Mr. Staples to come in over there, that there was one structure that was over-dig, and I went with my car and Mr. Staples arrived the same time I did, and Mr. Schaefer mentioned, he pointed me out that structure was kind of over-dig, which wasn't finished yet. I said "That's all right, we'll fix for you." Then he show me the other, where there was just a small structure on a rock. He said this one here, he had his form made already, he said it was a little too tight. I said "Yes, it is a little too tight, but I don't think on the rock, that won't put you out too much." He said that part's all right. He said "We like to have some of those structures fixed right." I says "All right, we'll fix for you," and there wasn't much said then, and I told Mr. Staples be sure from now on everything be correct. That's about all that was said then.

Q. That's all that was said?

A. That's about all that was said then.

Q. And who was there then?

A. Well, Mr. Schaefer was there.

(Testimony of Sam Macri.)

Q. That's Matt Schaefer, M. C. Schaefer?

A. Yes, and of course Mr. Staples was there, and if I remember right Mr. Waltie was over there.

Q. How about Bill Schaefer, was he there, too?

A. I think he was over there, if I remember right.

Q. Well, then, on that day there wasn't anything particular, no particular complaints made, just that a couple of structures were a little off?

A. That's all the complaining he made with me that day.

Q. All right, when was the next time you were there and met Mr. Schaefer on the field?

A. Well, the next time was in June. They say June 15; I guess it's all right. That's the next time I met him over there.

Q. Now, that time was an arranged meeting, was it not?

A. Yes.

Q. And your recollection is that you called Mr. Schaefer?

A. I did.

Q. Isn't it a fact Mr. Schaefer called you?

A. No.

Q. Do you have your long distance telephone records, toll [1791] sheets, here with you?

A. Pardon?

Q. Do you happen to have with you the records of your telephone calls?

A. No.

Mr. Holman: They were not demanded.

Q. Well, I can ask him if he's got them here. You do not have them here?

A. I got them, yes.

(Testimony of Sam Macri.)

Q. I say, you don't have the records here?

A. No.

Q. All right, then, you arranged over this telephone call to meet Mr. Schaefer on the job?

A. Yes, I told him he better come himself here, yes.

Q. And how many men did you have working on the job then? A. In June?

Q. At the time you had this meeting in June, June 15, '44?

A. Oh, I had the shovel working; I can't say offhand.

Q. Well, the shovel was sitting in the yard, wasn't it, Mr. Macri, when you got there on June 15?

A. No, we had two shovels. One was working overhaul, and the other was working. We had two shovels then.

Q. You had one shovel being overhauled?

A. Yes, we rent one, and the other one was my own, and I kept him over there until it was overhauled. [1792]

Q. So on June 15 you had one shovel working and one in the yard under repair, is that right?

A. Well, I can't say the particular day, but we can look through the records, the payroll.

Q. Is it your testimony you don't know?

A. It was always one shovel on the job. I never let one go until the other one was fixed.

Q. Well, you were over there on June 15.

A. Yes.

(Testimony of Sam Macri.)

Q. Well, wasn't your shovel broken down and in the yard that day you got there?

A. We had one in the field, one we rent.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

The Court: Do you understand the question?

A. Yes; we had one, our shovel, overhauled in the yard.

Q. Now, did you also see another shovel that day out working?

A. We rent another shovel.

Q. Mr. Macri, my question is, did you see on June 15, 1944, another shovel out on the job in operation?

A. On June 15 I don't go in the field where the shovel was.

Q. All right; then you didn't see it?

A. Naturally I didn't see it that day.

Q. All right. Now, on June 15, that's the day that you met [1793] Mr. Matt Schaefer and Mr. Hunter and Mr. Waltie from the Concrete Construction Company, is that true? A. Yes, sir.

Q. And you had Mr. Cohen with you?

A. Yes, sir.

Q. And then you went out on the field?

A. Yes, sir.

Q. And what took place that day? What was said and what was done?

(Testimony of Sam Macri.)

A. Well, that day when we went over there Mr. Schaefer say that some structures wasn't done right. I told him "If they're not right, we make it right," and of course I don't know what his point was. He started to say "I got to have 100 structures"; that's all right, we'll give you a hundred structures, and also he say there's some of our man did some work they are not supposed to do. I said "Well, in case they did, why, that's done, send a bill, I'll pay you for it."

Q. Anything else said?

A. With Mr. Schaefer that's about all that was say, and Mr. Hunter, his bond man, spoke about it; he say "You know, a sub-contractor always do a little squawking about it." He say "That's small stuff, I don't see nothing to worry about." I say "Far as I'm concerned, I want to cooperate 100 per cent with the sub-contractor, that's all I can do; [1794] anybody can make a little mistake on construction, always not perfect." He says "I understand that." Far as I know we left friendly, that's all I know.

Q. That's everything you can remember that was said on that day, June 15, 1944?

A. That's about all that was say.

Q. Mr. Schaefer said that he needed more structures to work on, is that right, needed 100, I think you said?

A. Well, yes, he tell me, and he tell Mr. Staples, too, he want 100. I said we'll give him 100, if he want 100.

(Testimony of Sam Macri.)

Q. He also told you he couldn't start to work with the crew and pour concrete until he did have that many ahead?

A. He don't say he can't start to pour, because I know better than that.

Q. Never mind what you know. I'm just asking what he said. He didn't say that? A. No.

Q. He just said he wanted 100 structures?

A. Well, that's what he say, he wanted 100 structures ahead.

Q. He didn't say why?

A. He don't tell me why.

Q. And he said his men were doing some work that they weren't supposed to do?

A. He said they did already.

Q. He said they had done some work they weren't supposed to [1795] do? A. Yes.

Q. Did he tell you what work?

A. Oh, he said they did some digging on the structure. He said "On one structure one of my men did a couple of hours on one structure." I says "All right, I'll pay for that."

Q. You didn't tell Mr. Schaefer to write you a letter on that?

A. I said "Mail me a bill, and I send you a check."

Q. You didn't tell Mr. Schaefer to write you a letter about the excavation he was doing?

A. I told him mail a bill, and I'll send a check.

Q. And that's all you said?

A. That's all I said.

(Testimony of Sam Macri.)

Q. And then the conversation was all over with and everybody left friends?

A. Yes, I think so.

Q. You came all the way from Seattle and brought an engineer with you, Mr. Schaefer and Mr. Hunter and Mr. Waltie came all the way from Portland to get up on the job, and that's all that you said?

A. Well, when we talk on the 'phone he says he's going to bring his bond man, and I told him all right.

Q. No, I say that's all that was said on the job, that you related? [1796]

A. That's all that was argument and complaint, that I heard.

Q. Now, Mr. Macri, when did you first remember about this April 29 meeting that you testified to on direct examination and also on cross-examination? A. When did I remember it?

Q. Yes, when did you first start to remember that meeting?

A. Well, after I heard here talking about it.

Q. Well, now, again referring to when your deposition was taken over in Seattle in your attorney, Mr. Holman's, office, you recall that Mr. Schaefer's deposition was taken first, do you not?

A. Yes.

Q. And you remember him testifying about a meeting on April 29 and one on June 15?

A. Yes.

Q. You heard that?

A. Yes.

(Testimony of Sam Macri.)

Q. And that took place before your deposition was taken? A. Yes.

Q. And didn't you then testify that you didn't remember anything about an April 29 meeting?

A. I said about an appointment.

Q. What?

A. I meant an appointment, it was not by an appointment.

Q. Well, let's see what you meant. [1797]

Mr. Holman: Give me the page when you read, counsel.

Q. Yes, I will. Page 40—I'll go back to the 23rd line of page 39, Mr. Holman, to get the continuity. I'm reading now, Mr. Macri, from your deposition:

“Question: Mr. Schaefer started the job on the 14th of March?

“Answer: He didn't start then.

“Question: He signed his contract then?

“Answer: Yes, sir. But he has to build his forms and make preparations. He didn't go on the job until the latter part of April.

“Question: How long after that was it approximately that you had this meeting with Mr. Schaefer on the project?

“Answer: Well, I think it was in June; I imagine it was around in June. It wasn't in the summer.

“Question: And that is the time you referred to that Mr. Schaefer showed you two of these structures and complained about them?

“Answer: Yes, sir.

(Testimony of Sam Macri.)

“Question: And you referred to a third?

“Answer: That is the time.

“Question: That is the only time you can remember of meeting Mr. Schaefer out on the project?

“Answer: I met him once before when he was with somebody else. He came in the office.

“Question: But when you had a conference with him you remember only one time, and you think it was in June?

“Answer: I think so.

“Question: You heard Mr. Schaefer testify about this April 29th meeting with you out on the project?

“Answer: Yes, sir; I heard.

“Question: You don’t remember that at all?

“Answer: No. I don’t recall. I talked with his man over there.

“Question: You don’t remember meeting Mr. Schaefer that first time at all on the project?

“Answer: If I recall right I only met him that time.”

And then referring to the questioning by Mr. Holman—I’ll ask you first, did you so testify, Mr. Macri? A. Beg your pardon?

Q. Did you so testify, as I have just read to you, over in Mr. Holman’s office, when your deposition was taken? A. Yes, I did.

Q. And you didn’t remember the April 29 meeting over there in Mr. Holman’s office?

(Testimony of Sam Macri.)

A. I thought it was for an appointment, the way I thought then.

Q. Pardon?

A. The way I thought, for an appointment.

Q. The way you thought, it was an appointment?

A. Yes, that's the way I understood it, and it was just in June where we made an appointment.

Q. When I asked you the question: "You heard Mr. Schaefer testify about this April 29th meeting with you out on the project? Answer: Yes, sir; I heard. Question: You [1799] don't remember that at all? Answer: No, I don't recall. I talked with his man over there." You say that's what you meant, was you were talking about an appointment?

A. Yes, that's the way I took it that time.

Q. That's the way you took it. Now, referring to page 59 and 60, this is questioning by your own attorney:

"Question: Is it or is it not a fact at or about that date, April 29, 1944, was the first time Mr. Schaefer was on the job for the purpose of inspection and starting work? Was it at about that time?

"Answer: He sent his brother and a young man—I don't know his name, and a couple of men from Portland. I never called to see Mr. Schaefer then."

(Testimony of Sam Macri.)

Did you so testify?

A. You mean on the same day I talked with this boy?

Q. I'm just asking you if you said the words which I have just read, at the time your deposition was taken in Mr. Holmans' office in Seattle.

Mr. Holman: Give me that page.

Q. That's the bottom of 59 and the top of page 60. I'll read it again, Mr. Macri; you listen. This is a question asked by Mr. Holman:

“Question: Is it or is it not a fact at or about that date, April 29, 1944, was the first time Mr. Schaefer was on the job for the purpose of inspection and starting work? Was it at or about that time?

“Answer: He sent his brother and a young man—I don't know his [1800] name, and a couple of men from Portland. I never called to see Mr. Schaefer then”.

A. I meant at that time when his brother was over there.

Q. You said that, did you, Mr. Macri, what I just read?

A. If it is in there, I must have.

Q. (Continuing the reading from the deposition)

“Question: You would say that you did not see Mr. Schaefer on the job in April, 1944?

“Answer: There was his brother over there, and a young man.

(Testimony of Sam Macri.)

“Question: Did you see Mr. Schaefer?

“Answer: I don’t recall at that time.

“Question: I am asking you definitely to say yes or no, because Mr. Schafer said positively just what I have read to you, that he was there on the job and said he would pull off. Is that true or false?

“Answer: He never said that to me.

“Mr. Bullivant: The question has not been answered. Did he see Mr. Schaefer on the job in April, 1944. That question has not been answered, and I insist that it be answered” Mr. Bullivant represented Mr. Schaefer in Portland, and also did some preliminary assistance on this case. He’s Mr. Schaefer’s counsel in Portland.

“Question: Do you know?

“Answer: All I remember meeting Mr. Schaefer is that time.

“Question: The time in June or in April?

“Answer: I can’t say which month it was, but that time when he had his insurance man with him”.

Did you so testify? [1801]

A. I guess I did, if it is over there, but my point was, the way I took it, just for an appointment.

Mr. Olson: I ask that be stricken.

Mr. Holman: I join.

Q. (By Mr. Olson): I’m just asking, Mr. Macri, did you so testify? A. I did, but——

(Testimony of Sam Macri.)

Q. Thank you; and continuing:

“Question: Well, can you answer whether or not Mr. Schaefer was on that job with you in April, 1944, he having signed the contract in March? I mean by Mr. Schaefer Mr. M. C. Schaefer, the gentleman who is here.

“Answer: I only remember once of being in the field with him.

“Question: That is the time about which you answered Mr. Olson?

“Answer: Yes, sir.”

Did you so testify? A. Yes.

Q. So that when your deposition was taken over in Seattle you only remembered meeting Mr. Schaefer out in the field the one time, and that was when his insurance man was there?

A. I meant by appointment; that's what I meant.

Q. You did remember more times, then, did you, over in Seattle? A. Beg your pardon?

Q. I say, when you were over in Seattle you remembered that [1802] April 29 meeting, when we took your deposition in Seattle?

A. Well, if I didn't have my mind freshened I would say no.

Q. Mr. Macri, when we took your deposition over in Seattle did you then remember this meeting you had with Mr. Schaefer on April 29, 1944?

A. That time I only recall one meeting, once.

(Testimony of Sam Macri.)

Q. Now, Mr. Macri, either you did remember it or you didn't. That's all I want to know. Did you remember it then, or did you not? A. No.

Q. You didn't remember it then?

A. Not then.

Q. And that was right after you had heard Mr. Schaefer tell you all about it?

A. Well, I wasn't positive of that particular day.

Q. You weren't posted about it?

Mr. Holman: Oh, I object to that.

The Court: I didn't understand that.

Witness: Positive.

Q. I'm sorry.

Mr. Holman: I'm just objecting to "posted".

Q. I thought he said posted. You said you were not positive about it? A. That day. [1803]

Q. But you had just sat there, had you not, Mr. Macri, and heard Mr. Schaefer testify in detail to the conversation and the date and in whose presence, about the April 29, 1944, meeting?

A. Yes, but when I'm not sure I don't like to make a statement.

Q. I see. Now, you say that you were out to the job on a Saturday afternoon with Mr. Klugg, I think you said, and Mr. Mercelle, and went out and checked 75 different excavations?

A. Yes.

Q. Or I think you said 75 structures?

A. Structures.

(Testimony of Sam Macri.)

Q. Was it 75 different excavations, or was it 75 structures?

A. No, there was 75 structures.

Q. And on what laterals were you on, or which lateral?

A. Oh, I started over there from the beginning, I think it was 59, the first lateral.

Q. The first lateral? A. Yes.

Q. Any others?

A. I can't recall. Mr. Klugg I guess can tell you more about it than I do.

Q. Well, if you don't know, say so.

A. We went on the beginning of the job, along the line, the first lateral, and go on. [1804]

Q. You were right there with Mr. Klugg and Mr. Mercelle? A. Yes.

Q. And you're the contractor that had this job, are you not, on 1062? A. Yes, I am.

Q. And you know where the laterals are, don't you? A. I know.

Q. I'm asking you, then, what lateral or laterals did you inspect these 75 structures on?

A. Well, it was on the beginning of the job, on 59.3, I guess, the first lateral, and we went down the line over there.

Q. Would you like to see a map, Mr. Macri, to answer that question?

A. Mr. Klugg and Mr. Mercelle is the one that drove the truck over there; I didn't have a map or nothing.

(Testimony of Sam Macri.)

Q. Do you know what laterals you were on?

A. I know Mr. Klugg took me to the first lateral, and we went to the structure, one to one.

Q. I'll show you your own exhibit, Mr. Macri, being Exhibit 75, and ask you if you can tell by looking at this map——

A. I don't know; probably I can.

Q. ——which lateral you were on. Was it the first lateral, Mr. Macri?

A. Yes, it was the first one. We took the truck over there. [1805]

Q. Well, that's lateral 59.3, is it not?

Mr. Holman: I'll stipulate that it is, counsel, if that will save time.

The Court: The first lateral is 59.3.

Q. I don't see why Mr. Macri doesn't know that. Isn't that true, Mr. Macri, you were on the first lateral?

A. Yes, I was; Mr. Klugg took us over there himself.

Q. On the first lateral, 59.3? A. Yes.

Q. About when was this that you were out on this lateral?

A. Oh, that was around the first part of June.

Q. Around the first part of June?

A. Yes.

Q. And did you examine any excavations on any other laterals, or was it all on this one?

A. I went over with their own men.

Q. I know you did, but where did you go? Was it all on this first lateral?

(Testimony of Sam Macri.)

A. Well, down the line, drive down with the truck.

Q. And all on this one lateral?

A. Well, after we get through with that, we must have jumped to the next one.

Q. Well, did you?

A. Just travel along on the truck, yes. They drove the truck. [1806]

Q. I'm not asking who drove; I'm just wondering whether you examined all the structures on 59.3, and then you examined the structures on any other lateral.

A. Mr. Klugg did the examination, not me.

Q. You don't know?

A. I wanted him to go ahead and tell me that they were all right.

Mr. Olson: I ask that be stricken.

The Court: Let it be stricken.

Q. If you don't know tell me so, and I'll quit asking.

A. We went down the lateral, and they drove the truck.

Q. Do you know what lateral you went down?

A. Started at one, right down the line, yes.

Q. How far did you go, how many laterals, up to those 75 structures?

A. Well, it was the first and second.

Q. Is that what you did, the first and second lateral?

A. And part of the second, I imagine.

(Testimony of Sam Macri.)

Q. I don't want what you imagine, Mr. Macri.

A. The first lateral was probably only 25 or 30 structures.

Q. Never mind how many on the lateral. I'm asking you from your own recollection of being out on the job, and being the contractor on the job, what laterals you were on when you examined those 75 structures.

A. Well, first and part of the second. [1807]

Q. All right. Now, do you know how many different excavations you examined on the second lateral?

A. I never marked each lateral. I just marked as we went along.

Q. Do you remember how many you examined on the second lateral?

A. No, only what I've got marked on the slip of paper.

Q. That's all you know, what you've got marked on the slip of paper?

A. Yes.

Q. And by that you refer to this identification 77?

A. Yes.

Q. All you know is what is marked on that slip of paper?

A. Just make a note.

Q. Is that all you know about this examination, sir, what you see on this piece of paper?

A. I went and marked it down.

Q. And is that all you now remember about this examination, is what you have on this piece of paper?

A. Yes.

(Testimony of Sam Macri.)

Q. Your answer is "yes"? A. Yes.

Mr. Holman: I didn't get your answer, Mr. Macri.

A. Yes.

Q. Now, I'm referring to page 12 of your deposition, Mr. [1808] Macri, where I was examining you, I'll ask you if you did not testify as follows, with reference to these 75 structures; line 15:

"Question: You mean 75 structures, or structure number 75?

"Answer: No, we measured 75.

"Question: You mean 75 different excavations?

"Answer: I think his foreman did. I wanted to make sure they had it exactly right, and Mr. Schaefer have nothing to say any more, and we measured 75 there, and his truck driver, and he can't deny it.

"Question: You measured 75 different excavations?

"Answer: His own foreman did.

"Question: Is that correct?

"Answer: Yes; I was along with them, yes.

"Question: Were those 75 excavations that had structures in them already?

"Answer: No, they were ready to put the forms in.

"Question: They were 75 excavations ready to have the forms put in?

"Answer: Yes, sir.

(Testimony of Sam Macri.)

“Question: Did you make any record of that inspection?”

“Answer: I mark it on a piece of paper, but I can’t find it, and Klugg is a witness, and his truck driver.

“Question: Have you that paper with you?”

“Answer: No.

“Question: Where is it?”

“Answer: It’s someplace.”

That’s the piece of paper you referred to as identification 77? A. Yes.

Q. Now, is it true, Mr. Macri, like you said in your deposition that I just read, that you examined 75 different [1809] excavations, or it is 75 structures, like you said here in court?

A. Structures.

Q. And not 75 different excavations?

A. I’m talking about the structures.

Q. Pardon?

A. I’m talking about the 75 structures.

Q. What time did you go out that Saturday, in the morning, or the afternoon?

A. It was during the morning.

Q. Pardon?

A. That was during the morning, if I remember right.

Q. It was early in the morning?

A. Toward in the morning, I said; before noon.

Q. Oh, before noon, towards the morning?

A. Yes.

(Testimony of Sam Macri.)

Q. Do you know about what time it was at all, or can you remember?

A. No, I don't remember exactly the time.

Q. Did you have lunch out in the field?

A. No.

Q. How long were you out there?

A. Oh, I must have been over for a guess, around three hours, I guess, a little better.

Q. Around three hours? [1810]

A. Yes, maybe more; I can't say exactly.

Q. Do you remember when you came in? Did you come in at noon, or——

A. No, I think it was toward the afternoon when we got through.

Q. As I recall, you said something Mr. Klugg said it's time to quit?

A. Oh, he said it's time to go home.

Q. Well, was that at noon on Saturday?

A. It was toward the afternoon.

Q. Matter of fact, Mr. Macri, you don't remember much about this trip at all, do you, this inspection trip?

A. I do remember it, yes.

Q. You took no measurements yourself?

A. Klugg did.

Q. Klugg took them?

A. Yes.

Q. So all you know about it is what Mr. Klugg told you?

A. Well, it was his men.

Q. I say, all you know about it is what Mr. Klugg told you?

A. Klugg told me they're all right.

Q. And that's all you know about it?

A. I took his words for it.

(Testimony of Sam Macri.)

Q. Now, referring to plaintiff's Exhibit 5, which is the sub-contract between yourself and Mr. Schaefer on job [1811] 1062, as I understand it, you said, Mr. Macri, that this part of the bottom of page 1 which is the third page but marked page 1, the bottom of the typewritten matter that's X'd out, that that was X'd out after Mr. Schaefer had said that he was not going to furnish the form lumber. Is that your understanding of it, or is that the way it happened?

A. It was took out before it was signed, the contract.

Q. But you said, did you not, Mr. Macri, that at first Mr. Schaefer was going to furnish the lumber, and you drew the contract up that way, and then when it was decided he would not furnish the lumber, then this line was X'd out; isn't that what you said?

A. Well, there's nothing said about the lumber; he was going to furnish himself, first, and then I—

The Court: Read the question and see if he can answer. Answer the questions, if you can.

(Whereupon, the reporter read the last previous question.)

Mr. Holman: Just a minute, your Honor. I take it you mean here in Court?

Mr. Olson: I am referring to here in court, in response to direct examination.

Q. (By Mr. Olson): Did you say that, Mr. Macri?

(Testimony of Sam Macri.)

A. About the lumber, there was some correction, where Mr. [1812] Schaefer don't like it.

Q. Well, if you don't remember what you said before, Mr. Macri, tell me now; and I'm referring to page 1 of the sub-contract, plaintiff's Exhibit 5; what are the circumstances of that first type-written line at the bottom of the page having been X'd out?

A. Well, that was for steel; why, the government furnished the steel, and him or I won't need to furnish the reinforced steel.

The Court: I didn't get that.

(Whereupon, the reporter read the last previous answer.)

Mr. Olson: I ask that it be stricken, your Honor, as not being responsive.

The Court: Well, I understand that's his explanation of why that was X'd out; isn't that what you're saying?

A. Yes.

The Court: That's in answer to the question.

Q. Then the X'ing out of that line had nothing to do with who was going to furnish the lumber?

A. Not that line that's scratched out, no.

Q. Now, didn't you tell Mr. Holman a while ago on direct examination that the reason that line was X'd out was because it was decided that you would furnish the lumber, [1813] instead of Mr. Schaefer?

A. I said there was some words added to that contract about the lumber.

(Testimony of Sam Macri.)

Q. Well, then, Mr. Macri, the changing or the X'ing out of that portion of the contract had nothing to do with who was to furnish the form lumber?

A. Not when the contract was signed.

Q. I say, it had nothing to do, it wasn't scratched out because of any change in agreement as to who was to furnish the form lumber? A. No.

Q. Now, handing you defendant Macri Exhibit 76, Mr. Macri, was one of those vouchers attached to each check that you sent the Concrete Construction Company? A. Yes.

Q. Do you have with you, Mr. Macri, the checks that were paid the Concrete Construction Company? Do you have them here with you?

Mr. Holman: I have them at the hotel, complete. I can have them this afternoon.

Mr. Olson: I wish you would have them here.

Mr. Holman: Yes, I will do the same as you did with Mr. Hendershott.

Mr. Olson: I am particularly asking about the checks that were sent with the letter dated April 28, 1945, in the amount of \$7,050.50, and the check sent——

Mr. Holman: Will you give me that amount?

Mr. Olson: \$7,050.50, and one for \$2,985.46 in February, I think, 1945.

Mr. Holman: Do you have the letter?

Mr. Olson: Well, it apparently wasn't sent with a letter.

(Testimony of Sam Macri.)

Cross-Examination

(Continued)

By Mr. Olson:

Q. But you never sent a check unless it had one of these vouchers attached to it?

A. I was going to say, yes, there's two or three checks we run out of those checks, and we used a different check.

Q. So all of your checks didn't have these vouchers attached to them, did they, all of your remittances to the Concrete Construction Company?

A. All but a couple; we run out of those checks and we used the regular check.

Q. Well, aren't these checks your regular checks, that have these vouchers attached to them?

A. Yes, but we ran out of them.

Q. So that the last checks you sent didn't have these notations?

A. I can't say if that's the last or first. There's a couple of checks we run out of those vouchers.

Q. Now, Mr. Macri, do you know when your payroll shows that [1815] you first had a fine grader on this job 1062?

A. I think it does show, yes.

Q. Pardon?

A. I think the payroll shows.

Q. Now, showing you Macri's identification 15, Mr. Macri, and directing your attention to the payroll of Macri and Company for the week ending November——

(Testimony of Sam Macri.)

Mr. Holman: It shows up there at the top. May I help you?

Q. I want to get November 16—for the week ending November 22, 1944, there is a fine grader appearing on that payroll, is there not?

A. Yes.

Q. All right; now, will you please point out where a fine grader—well, strike that—isn't that the first time, Mr. Macri, that you ever had a fine grader shown on your payroll?

A. First time?

Q. Yes.

A. You mean the words "Fine grader, James Black" you mean?

Q. I'm asking if that isn't the first time you ever show a fine grader on your payroll on 1062.

A. We got a regular laborer we don't call a fine grader.

Mr. Olson: I ask that be stricken as not being responsive, what he calls them. I asked what is shown on [1816] his payroll.

The Court: Answer the question if you can.

Q. Isn't that the first time that you show on your payroll a fine grader on job 1062?

A. Well, they make this payroll on the job. I can't say how they classify their men, but this labor, that's all they do, work on that kind of stuff.

Q. I ask you, Mr. Macri, isn't it a fact on the week ending November 22, 1944, is the first time that your payroll shows a fine grader on this job?

(Testimony of Sam Macri.)

Mr. Holman: I object to that question unless counsel gives him a chance to go through the payroll.

The Court: Well, he can answer if he doesn't know.

Mr. Olson: I'm not restricting him on that.

Witness: Well, as I say, we had a man to do fine grading at the beginning of the job.

Q. Well, if you had one on, he didn't show that way on your payroll before, did he?

A. A. J. Black was a fine grader; he's supposed to be specified.

Q. And that's the day he went to work for you on that week?

A. If it's shown here that he did.

Q. Well, I want to know, isn't that the week he first started working for you?

A. J. A. Black? [1817]

Q. Yes, and the week ending November 22, 1944, is the first week that Mr. Black went to work for you on this job 1062? A. Yes.

Q. And you don't show on your payroll any fine grader before that time, do you?

A. Well, the superintendent hire all those help, and if he don't want to classify as a fine grader, I can't help.

The Court: Do you know, or don't you know, if there is a fine grader on the payroll?

A. Well, I can't tell until I go over that.

The Court: That's the answer.

(Testimony of Sam Macri.)

Q. You don't know?

A. Not until I go over that.

Q. Well, not right now, but would you check that, and see whether you have a fine grader any other time, or any prior date, on your payroll? Would you do that, Mr. Macri?

A. All right.

Q. Now, on this June 15 meeting, you told Mr. Schaefer that if there was any extra work—are you listening, Mr. Macri? A. Yes.

Mr. Holman: Just a minute; your Honor, I submit he's asked him to look through the payroll, and now he's shooting questions at him.

The Court: He said not now, but later. [1818]

Mr. Olson: Well, I have no objection to him doing it now. How long would it take you?

Mr. Holman: I don't want to invoke counsel's rule of employing people to look at it during the recess, but I want him to do one or the other.

The Court: Well, I understood him to say he wanted him to examine it, not now, but later. I think probably Mr. Macri mis-understood him.

Mr. Olson: I'm going to be through in just a few minutes.

The Court: Well, we'll recess for five minutes. Maybe he can look through the payroll during that time.

(Short recess.)

(Testimony of Sam Macri.)

(All parties present as before, and the trial was resumed.)

Cross-Examination

(Continued)

By Mr. Olson:

Q. Have you had an opportunity to look over his payroll? A. Yes, sir.

Q. And do you find a fine grade man on there before that week I spoke of?

A. Just A. J. Black is the one I can see there.

Q. He's the only one you can see?

A. That's classified as a fine grader.

Q. And you find no other fine grader appearing on your payroll prior? [1819]

A. You mean that qualifications, as a grader?

The Court: He means, I presume, under that name.

A. Yes, sir.

Q. Now, Mr. Macri, showing you plaintiff's Exhibit 12, page 65, and drawing your attention to structures 427 and 428, can you tell me by an examination of that structure, speaking of the 427-428 structure, how far it is from the—or how deep it is from the top of the wall to the floor of the invert in the portion of the structure located in the upper left portion of that diagram?

Mr. Holman: Just a minute. Your Honor, I object to this as improper cross-examination unless it is for the purpose of testing Mr. Macri's ability

(Testimony of Sam Macri.)

to read the plans. There's nothing brought up in the direct regarding that structure, or any other structure.

Mr. Olson: Well, that's the purpose of it.

Mr. Holman: If it is for the purpose of testing, I naturally don't resist.

The Court: Overruled.

Q. (By Mr. Olson): Can you tell me how far it is? A. The elevation?

Q. I want to know how far it would be from the top of that wall to the floor of the excavation, or floor of the concrete invert.

A. Well, it is a 975, 66—— [1820]

Q. Well, you're referring to the wrong one. I'm speaking of structure 427-428.

Mr. Holman: Those are two structures. Which one, counsel?

Mr. Olson: Well, they're two structures, but they're in the one excavation. I'm referring to 427.

Mr. Holman: Are you asking about the excavation, or the structures?

Q. (By Mr. Olson): How far is it from the floor of the invert located in the—the deepest invert on structure 427 to the top of the wall?

A. You mean one by one, here, or——

Q. Speaking about the portion of the structure that's in the upper left hand corner of the diagram, the one I've got my pen on.

Mr. Holman: Would you give me that page?

Q. On page 65; now, how far is it from the floor of the invert to the top of the wall?

A. Well, the work here is 979.

(Testimony of Sam Macri.)

Q. Do you want some paper and a pencil?

A. No, I don't need it.

Q. Just tell me in feet. A. Huh?

Q. Just tell me the feet.

A. You mean the depth, or what? [1821]

Q. Yes, the depth from the top of the wall down to the floor of the invert. Do you know how to figure it, Mr. Macri?

A. Oh, I'm not too expert on this kind of stuff, figures, no; I'm not qualify as an expert.

Q. In other words, you can't figure that?

A. Well, if I get your point I probably can.

Q. Well, maybe I better make myself clear. Do you know what the floor of the invert is? Do you know what this "Inv" refers to, on that structure 427?

A. Yes, that's the invert.

Q. That's the invert; all right. Now, that's surrounded by two lines which have some figures on it. What does that indicate? Well, here, Mr. Macri, I'll put my pen right on it, 427, page 65, of this exhibit.

A. Yes.

Q. And I'm asking you how far it is from the floor of that invert to the top of the wall that surrounds it. Now, if you don't know, and can't figure it, well, tell me, and we'll leave it.

A. You want to know how deep it should be?

Q. I want to know the answer to the question I just asked you. If you don't know the question we'll have it re-read to you. Are you unable to tell me the answer to that question from that diagram, Mr. Macri?

A. No. [1822]

(Testimony of Sam Macri.)

Q. All right, thank you. You've been in the construction business for how many years, did you say, Mr. Macri? A. Around 26 years.

Q. Huh? A. Around 26 years.

Q. Did you ever have a job of this type that was on 1062, before?

A. Not this structure, no.

Q. Well, of this type of structure?

A. I say no, it's the first one I had.

Q. And you aren't able to look at the structure lay-out plan and figure the elevations, are you, as shown right on the plans?

A. No; I had a minute to do it.

Q. So that when you went out to look at the job and looked at these excavations, you weren't able to tell anything about whether or not they were to sub-grade, or whether they weren't, were you?

A. With the men I got on the job, yes.

Q. As far as you yourself was concerned you don't know how to figure it?

A. Every contractor has their superintendent.

Mr. Olson: I ask that be stricken.

Mr. Holman: I join.

The Court: It will be stricken. [1823]

Q. As far as you yourself was concerned, Mr. Macri, you didn't know how to figure it, did you?

A. Figure?

Q. To figure whether or not the floor of the excavations was to proper grade or not?

A. When we figure jobs we don't figure those things ahead of time; we do that while we go along with construction.

(Testimony of Sam Macri.)

Mr. Olson: I ask that be stricken.

The Court: I doubt if he understands the question.

(Whereupon, the reporter read the following:

“Question: As far as you yourself was concerned, Mr. Macri, you didn’t know how to figure it, did you?

“Answer: Figure?

“Question: To figure whether or not the floor of the excavations was to proper grade or not?”)

Witness: You mean when we figure the jobs, or when we do construction work?

Q. I’m asking if you went out and looked at an excavation, you, yourself, are unable and were unable to take these plans and specifications and this excavation and tell whether or not it complied with the plans and specifications and the structure layout plan; you, yourself, without any help?

A. Myself, personal, I never measure one anyhow.

Q. And you don’t know how to do it?

A. Probably when it was staked out I could measure it all [1824] right.

Q. He said when it was staked out, I think. But you, yourself, without some help from somebody, don’t know how to do it; that’s true, isn’t it?

A. Yes.

(Testimony of Sam Macri.)

Q. Mr. Macri, isn't it a fact that you saw George Schuler and Fred Waltie actually excavating one of these structures out in the field, one of the excavations, I mean?

A. I don't recall; I don't know who is this George Schuler you mentioned about.

Q. Well, isn't its a fact that you saw two men, at least one time you were out on the job, actually digging, of the Concrete Construction Company's men?

A. Well, I don't know what you mean, digging, now, because when they set the forms they probably level off some; I don't know about it.

Q. Didn't you see them, Mr. Macri, down in the hole, two men with shovels, and diggings?

A. No.

Q. You didn't see it? A. No.

Q. On Structure 18?

A. Well, structure 18, if it is the one by the road, the one they been making so much complaint, I sent my superintendent to fix for them. [1825]

Q. I'm asking if you did not stand right there at structure 18 and see Mr. Waltie or Mr. Schuler or two men who were not your employees, but employees of the Concrete Construction Company, see them digging in the hole? A. No, I didn't.

Q. Mr. Macri, weren't you standing right there when Mr. Schaefer told them to get out of the hole and to quit excavating? A. I don't recall.

Q. You don't recall? A. No.

(Testimony of Sam Macri.)

Q. You heard Mr. Waltie testify to it here in Court?

A. I heard a lot of testimony here in court, all right.

Q. Well, you heard him testify as to that specific structure?

Mr. Holman: I didn't get the answer.

The Court: He didn't answer yet.

A. Well, I heard Waltie testify, but I don't recall the words he used.

Mr. Olson: That's all.

Redirect Examination

By Mr. Holman:

Q. Mr. Macri, reverting back to the first part of your cross-examination, will you tell me whether or not, if you recall, there was lumber delivered for use on 1062, schedule 1, after you delivered the lumber for the stilling pool? [1826]

A. Oh, yes.

Q. Sir?

A. Yes, there was some lumber delivered to that.

Q. After that? A. Yes.

Q. Yes, sir. Now, can you tell me why there was a delay between the time of the order for the stilling pool lumber and its delivery? What were the facts surrounding that?

A. Well, for one thing, they say they don't need that up to the end of the job.

Q. Now, wait a minute; you say "they said"; who said? A. Darcy.

(Testimony of Sam Maeri.)

Q. Said he didn't need it until what?

A. Until the end of the job, because that's the last operation he's going to do, on the stilling pool.

Q. And what were you doing interveningly with respect to getting that order filled?

A. Well, I have to work pretty hard, because they wanted some flooring that was pretty hard to get in those days, so I placed an order in two or three mills, until finally they got it for me.

Q. And I'll ask you whether or not the order was filled at or about the time the delivery was made?

A. Oh, no; I placed the order during the summer.

Q. You didn't answer my question. I asked you if it was filled about the time you delivered it, or had you had the lumber for some time, and just held it at Seattle?

A. Oh, no; as soon as I got them I sent them.

Q. What difficulties did you have to go through in order to get that flooring?

Mr. Olson: That's objected to as being immaterial.

Mr. Holman: If your Honor please, counsel has asked for the time of the order's submission, and the time of furnishing, and let it stand there.

The Court: Overrule the objection.

Q. Tell the Court what you had to do, what you did do.

A. I went and placed the order in two of those responsible sawmills, until finally I got hold of

(Testimony of Sam Macri.)

these people in Everett, which is Walton Lumber Company, and I asked him if he can do a favor; more than anything else I know it was hard to get during the war; we were short even on defense homes. He says "Myself, personally, even a year from now I can't give it to you, but I'll get in touch with a couple of more mills and see if I can spare for you."

Mr. Olson: This is a conversation with who?

A. Walton Lumber Company.

Mr. Olson: Well, I'm objecting to that conversation. [1828]

The Court: Yes, I think that is improper, and may be stricken. He can tell what he did.

Q. I didn't ask what somebody said, I asked you what you did.

A. He went and got it for me then.

Q. Well, when?

A. Well, he was unable to get it until the first part of February.

Q. First part of what?

A. First part of February, I think it was.

Q. Of February, 19—what? A. 44—or 45?

Q. 1945? A. 1945.

Q. Now, is that the first time that you were able to get that at all?

A. That's the first time.

The Court: Is he testifying about the flooring now?

Mr. Holman: Yes, your Honor.

(Testimony of Sam Macri.)

The Court: Was the flooring used on the stilling pool?

Mr. Holman: That was the order Mr. Darcy sent in.

The Court: All right.

Q. (By Mr. Holman): Mr. Macri, counsel asked you if it wasn't a fact you changed engineers, from Staples to Stickney to [1829] Ashley to King; now, I'll ask you whether or not Mr. M. C. Schaefer had anything to do with the change of those engineers?

A. Yes, especially Mr. Ashley. He called my attention once, and he say——

Q. Well, first, let's start with Staples. Did he have anything to say with respect to Staples being discharged?

A. Yes, Mr. Schaefer told me once——

Q. Pardon me; in a conference, or by telephone, or what? How was it done?

A. Well, once when I start to met him to come in to work——

Q. Well, Mr. Macri, I want my questions answered just the way I'm asking you. Was it done by telephone, or was it done in a talk you had with him on the job, or in the office, or how was it done?

A. I told him on the telephone that particular time.

Q. All right; what was said, and when was that conversation?

A. Well, it was during the first part of June.

(Testimony of Sam Macri.)

Q. All right, sir; now what was said in that conversation?

Mr. Olson: Is this a conversation from Mr. Staples to you?

Mr. Holman: No, it is from Mr. Macri; Mr. Macri and Mr. Schaefer.

Mr. Olson: I thought you said Mr. Schaefer never called him? [1830]

Mr. Holman: I object to that, your Honor.

The Court: Yes, that will be stricken out.

Q. (By Mr. Holman): Did you call Mr. Schaefer, or did Mr. Schaefer call you?

A. I called Mr. Schaefer.

Q. All right, tell the Court what was said in that conversation about the engineer Staples.

A. Well, I told him why he don't come in and start to work, and he said "till you have that man on the job, that I don't feel like I want to pour any concrete."

The Court: I didn't get that.

(Whereupon, the reporter read the last previous answer.)

Q. I don't understand your answer, Mr. Macri.

A. Till Mr. Staples was on the job he don't feel like pouring concrete.

Q. You say "till he was on the job"?

A. Till he was on the job.

The Court: You mean so long as he was on the job?

(Testimony of Sam Macri.)

Q. Is that what you mean, as long as he was on the job he didn't want to pour? A. Yes.

Q. Then what did you tell Mr. Schaefer in that conversation?

A. I told him he better come over himself on the job, so we can straighten all this stuff out; I talked with some of [1831] your men and the structures are all right, and you claim they're wrong; you better come up yourself so we can straighten those things up. He says "All right, I'll bring my bond man," and I says "All right, I'll bring an engineer, and probably those things can be solved."

Q. All right, do you know about when that conversation was? I guess you've given that.

The Court: Early in June.

A. Early in June, I was there.

Q. Then later was there a date fixed, or did you fix a date of coming up at that time?

A. Yes, we fixed the date then.

Q. You covered your face and we couldn't hear a thing you said. A. I say "yes."

Q. In that telephone conversation, or later?

A. I think it was on some telephone we make an appointment to meet.

Q. Well, did you make an appointment then, or not?

A. Yes, we did, and we met over there.

Q. And what date did you recall you made it for?

A. Well, that's when they testified June 15, so I guess it is that time.

(Testimony of Sam Macri.)

Q. Now, what with respect to the engineer Ashley? What was said about him, if anything? [1832]

A. Well, after this was all over, I tell them all I can do now is just to bring an engineer on the job and to go ahead so they can go to work.

Q. I'll ask you whether or not you told them you were going to bring Mr. Cohen, and he was going to be the engineer?

A. No, I told them I bring an engineer on the job; I don't tell them Mr. Cohen.

Mr. Holman: I'll cover these witnesses, your Honor, so I'll not pursue that any further.

The Court: Well, if you haven't anything ready there, we'll recess now. I thought counsel might like to know that the Court does not plan to have any session tomorrow. We'll adjourn this case at 4 o'clock this afternoon until 10 o'clock Monday morning. The Court will recess now until 1:30.

Mr. Hawkins: Your Honor, I wonder if Mr. Goerig might be excused from being here this afternoon?

The Court: The Court has no objection, certainly, if counsel haven't. Does anyone have any objection to Mr. Goerig being excused?

Mr. Olson: No legal objection, your Honor. We'll miss him.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.) [1833]

(Testimony of Sam Macri.)

Yakima, Washington, Friday, March 14, 1947,

1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, may the record show that I am delivering at this time to counsel Olson, agreeable to his request before luncheon recess, Macri and Company check number 804 dated February 8, 1945, for \$1,626.40, together with a carbon of the face of that check as to amount and payee and date, and a detail as contained on the portion of the check which is not here, a carbon of that; also Macri and Company's check number 946 dated February 26, 1945, payable to the order of the Concrete Construction Company, for \$2,852.81, with similar carbons, plus an endorsement on the bottom that apparently has no—that isn't your endorsement, is it, Mr. Clerk?

The Clerk: No, sir.

Mr. Holman: —has no place in this case, which should be stricken, and Macri and Company check number 1185 dated April 28, 1945, for \$7,-050.50, for which I do not have a similar carbon. These are delivered to counsel, your Honor, with the request that in the event the checks themselves are admitted in evidence, that counsel be required to substitute photostatic copies, because they are necessary for the office accounting. Here you [1834] are, sir.

(Testimony of Sam Macri.)

Mr. Olson: Your Honor, as long as they're making statements for the record, may the record show that I have now returned to Mr. Holman the instruments which he delivered to me, the witness having subsequent to my request for them admitted that the vouchers which are in evidence were not attached to the checks.

Mr. Holman: I would like to express my gratitude to counsel for exhausting most of my noon hour, your Honor. That's all.

The Court: Well, let's proceed with redirect.

(Whereupon, Calendar for years 1944, 1945 and 1946 was marked Defendant Macri's Exhibit No. 84 for identification.

(Whereupon, Order for lumber to Macri, July 25, 1944, was marked Defendant Macri's Exhibit No. 85 for identification.)

Mr. Holman: Your Honor, with consent of counsel and the Court, and for convenience of all parties, I have had a calendar for 1944 and 1945, and on the reverse side 1946, marked as an identification. If it is proper to be admitted it might be convenient.

The Court: Have you seen this identification 84, Mr. Olson? Do you have any objection to putting the calendar in, for convenience?

Mr. Olson: No, I have no objection. [1835]

Mr. Hawkins: Is that the calendar for 1944?

(Testimony of Sam Macri.)

The Court: As I understand it, it is the calendar for 1944 and 1945, with 1946 on the reverse of one of them.

Mr. Hawkins: No objection.

The Court: If there is no objection, then, defendant Macri's identification 84, the calendar, will be admitted in evidence.

(Whereupon, Defendant Macri's Exhibit No. 84 for identification was admitted in evidence.)

Redirect Examination

(Continued)

By Mr. Holman:

Q. Handing you what has been marked Macri's identification 85, I'll ask you if you will tell the Court how you received that, and what, if anything, it has to do with what you testified about lumber, Mr. Macri?

A. Yes, this is a list I received from Mr. Ashley, engineer, and he say this is the lumber required for stilling pool, which they cannot get locally.

Mr. Olson: I ask that that last answer be stricken, your Honor, as reading from the identification, as to what somebody else said.

(Whereupon, the reporter read the last previous answer.)

Mr. Olson: I think that last sentence.

The Court: I think the last should be stricken as [1836] hearsay.

(Testimony of Sam^l Macri.)

Q. (By Mr. Holman): All right, sir. Did you learn whether or not, through any of your superintendents or otherwise, if this material as shown on this list could be secured locally?

A. Yes, and they said they can't.

Q. Never mind; I'm just asking you if you did learn that, sir? A. Yes, sir.

Mr. Holman: I move the portion that said they can't be stricken, your Honor, complying with the rule.

The Court: That's all right.

Q. Now, directing your attention to the date shown here, will you tell me whether or not shortly after that you received that, or whether that date is correct—strike the question—will you tell me when you received that, looking at that date as to whether or not that is about the time?

A. 7/25/44.

Q. Is that about the time you received that?

Mr. Holman: Offer in evidence identification 85, your Honor, for all purposes.

Q. I asked if this is about the time you received it, the date there, is that right, or not?

A. A couple of days later, because that been by mail; it [1837] come in by mail.

Mr. Olson: We object to the introduction, your Honor, on the ground that it's a communication between Mr. Macri and his own foreman, Mr. Staples; nothing prepared by us. If he has the list which we gave them that would be perhaps of some effect, but the fact that Mr. Ashley sent in a

(Testimony of Sam Macri.)

list on that date has no binding effect on us; it's no indication that it was the first time it was ordered; it's no indication that that is the lumber which we did order, or a complete list of it, and is purely a self-serving document, particularly as to the typewritten portion of it, containing statements——

The Court: It seems to me that this statement "This lumber is not available at Sunnyside" is objectionable. I suppose it is a conclusion reached by Mr. Ashley, who is supposed to have sent the memo.

Mr. Holman: Yes, Mr. Ashley will be a witness and will further identify it, but the object I had in offering it now was that counsel on cross-examination interrogated about this in great detail, and I felt that made it competent upon the testimony of Mr. Macri.

The Court: Sustain the objection at the present time.

Redirect Examination

(Continued)

By Mr. Holman:

Q. I'll ask you whether or not with the listing as shown on [1838] identification 85, that was the lumber which was furnished for the stilling pool?

A. Yes.

Q. And will you tell me whether or not as between the date indicated on Macri's identification 85,

(Testimony of Sam Macri.)

and the time that the lumber was furnished, was the time you spoke of as spending to get that lumber?

A. Yes, it was the order.

Q. With reference to exhibit 84 and the calendar on that for 1944, and directing your attention specifically to the date of April 21 of the year 1944, and to the sub-contract on 1068, plaintiff's Exhibit 6, and the date thereof, April 21, 1944, which I'll hand you, Mr. Macri——

A. Yes.

Q. You have those; and directing your attention to your answers to counsel Olson on your cross-examination as to believing that that contract was signed on Sunday, can you tell me whether or not it was signed on Sunday, or whether it was signed on the date of the contract?

A. It was signed the day of the contract.

Mr. Olson: What was that?

(Whereupon, the reporter read the last previous answer.)

Q. Mr. Macri, when you from time to time went on to the job, 1062, schedule 1, will you tell me whether or not [1839] you devoted your time to the schedules 7, excavation common, 8, rock excavation, 9, back fill, 12, concrete structures, 13, placing re-enforcement bars, and 15, erecting timber in structures? Do you understand what I'm asking you?

A. I don't quite get that.

Mr. Holman: Will you read the question, please?

(Whereupon, the reporter read the last previous question.)

(Testimony of Sam Macri.)

Mr. Holman: I thought I had the word "exclusively" in there, Mr. Reporter. Exclusively upon those, or not?

A. Well, we just go around and look the job over.

Q. Mr. Macri, I'm asking you whether or not you spent all of your time on those items I've called for, or other items; what did you do?

A. No, I didn't spend all my time on that.

Q. Well, what did you do?

A. Well, we had pipe to lay, and several different items to take care of.

Q. But what did you do? I know you have other items, but what did you do?

A. Well, just go all over, look the job over.

Q. Well, on these items, or on all items, or what did you do?

A. On all items, naturally we looked them over.

Q. Now, will you tell me, please, whether or not when specification 1062, schedule 1, was taken over for operation by Mr. Schaefer, plaintiff's Exhibit 5, the sub-contract——

A. Yes.

Q. ——just a minute; will you tell me whether or not at that time there was any lumber or other lumber products which had been previously worked upon by the Macri forces ahead of that?

A. Yes, there was.

Q. Tell the Court what it was, will you?

A. Well, first we built a camp, put up an office, telephone and light, and we had considerable lumber

(Testimony of Sam Macri.)

material over there, started to build the forms; we had a lot of nails and a lot of miscellaneous.

Q. Well, were there any forms built, or not?

A. Yes, there were some forms built.

Q. By forms I mean the panels or the component parts of the forms?

A. Yes, there was quite a considerable panels.

Q. Approximately how many, would you say?

A. Oh, offhand I say probably about 25 or 30.

Q. And was Mr. Schaefer charged for that which you turned over, or not? A. No. [1841]

Mr. Olson: Now, if the Court please, I object to that. I thought counsel was leading up to something. I don't see any materiality whether or not they had 25 or 30 panels built when we took the job over, and whether they charged it to us or not.

Mr. Holman: There's to be an accounting made here, your Honor.

Mr. Olson: Not unless you've got some agreement of some kind with reference to it.

The Court: Well, Mr. Macri was to furnish the lumber, wasn't he?

Mr. Holman: Yes, your Honor, but this, as I understand his testimony, is manufactured forms.

The Court: Are you asserting a claim for those?

Mr. Holman: Not at all, your Honor.

The Court: What is the materiality, then?

Mr. Holman: Well, the materiality is on the matter of co-operation, your Honor.

The Court: Well, overruled.

(Testimony of Sam Macri.)

Redirect Examination
(Continued)

By Mr. Holman:

Q. And you said about nails; approximately do you recall how many nails or what kind of nails you had there?

A. Yes, there was eight or ten keg nails.

Q. And were those charged to Mr. Schaefer, or not?

A. No. [1842]

Q. Were they delivered to him, or not?

A. Well, they was in the shed over there, and I left them over there.

Q. Can you tell me whether they were delivered to Mr. Schaefer or not? In other words, did you get the use of them, or Mr. Schaefer?

A. Well, when we started we used some ourselves, and left them over there.

Q. I'm talking about after Mr. Schaefer took over, were the rest of those nails delivered to Mr. Schaefer to use, or did you take them away?

A. No, I didn't took them away.

Q. Well, were they made available for Mr. Schaefer, is what I want to know.

A. Yes.

Q. Now, Mr. Macri, calling your attention to what counsel read you from your deposition which had been taken at Seattle—I'm reading from page 41, line 3 to line 16, Mr. Olson—I'll ask you whether or not these were questions propounded to you, asked you, and answered: "Question: Were you on the job at a meeting with Mr. Schaefer when

(Testimony of Sam Macri.)

Mr. Staples was there? Answer: I will have to think about it. Question: I will ask you this way, Do you know who was there at the one time you do remember? Answer: I remember once when Mr. Schaefer and [1843] the bonding man was there. Question: But you do not remember who your foreman was? Answer: Mr. Staples was there, the foreman. Mr. Staples was the foreman then. Question: Was Mr. Staples there when you were talking with Mr. Schaefer? Answer: I think Staples come in afterwards. Question: Was Fred Waltie there? Answer: Who is Fred Waltie? Question: He was one of Mr. Schaefer's foreman. Was he there? Answer: That young man—yes. I think he was there."

Now, did you testify to that at that time, the time of taking that deposition, that way?

A. Yes.

Q. Then turning, Mr. Olson, to page 59, line 21, of the Macri deposition, and continuing to line 3 of page 61, I'll ask you whether or not, Mr. Macri, at that time these questions were asked you and these answers given:

Mr. Olson: Is that on 59?

Mr. Holman: Line 21, to line 3 on page 61.

Mr. Olson: Well, that's where I read.

Mr. Holman: You did?

Mr. Olson: Yes, exactly.

Mr. Holman: Oh, then I have the wrong note, Mr. Olson. Thank you.

(Testimony of Sam Macri.)

Q. (By Mr. Holman): Mr. Macri, in answering counsel about the laterals and the time you were on them with Mr. Klugg and [1844] some other gentleman, I think you said Mercelle, measuring, you stated, according to my notes here, you were on the first lateral and went from the structures one to one, that's the way my notes read, one to one; I'm not clear what you mean. Do you get what I'm talking about, Mr. Macri? You used these words, now listen, "one to one"; you used those words; now, what do you mean?

A. One to one?

Q. That's what you said into the record. Now, what do you mean by that? You said you looked at these structures one to one. What do you mean?

A. I meant to say one, two, three, and go on the line.

The Court: He meant one by one.

Q. That's what I thought. The record was not just clear on that. Is that what you mean, one by one, one right after the other?

A. That's what I mean.

Mr Holman: At this time, your Honor, in view of the cross-examination of counsel, and particularly the type of cross-examination of counsel, I offer in evidence Macri's identification 77, which had been previously refused as self-serving.

Mr. Olson: I make the same objection, if your Honor please.

The Court: I think it should be admitted now. It's [1845] been explained both on direct and cross.

(Testimony of Sam Macri.)

(Whereupon, Defendant Macri's Exhibit No. 77 for identification was admitted in evidence.)

Mr. Olson: Let the record show our objection on the further ground there aren't that many structures on the laterals he says he examined them on, and the record shows it.

The Court: Overruled.

Redirect Examination

(Continued)

By Mr. Holman:

Q. With reference to plaintiff's Exhibit 5, the sub-contract for performance on 1062, will you indicate off of the first page what portion you said was stricken out, that referred to steel only?

A. Yes, that's I imagine steel, and——

Q. Mr. Macri, I just can't have in the record what you imagine.

A. Yes, I said they mention here.

Q. Now, when you say "here" I want to get it for the purpose of the record, you're talking about the line that is X'd out, 5th line from the bottom?

A. Yes.

Q. You're not talking about the place in the middle of the page where there's X'ing out, or not?

A. No.

Q. And you were talking only with respect to that one page, [1846] were you? A. Yes.

Q. And were you talking from memory, or from examination of this page, Mr. Macri?

A. I examined it.

(Testimony of Sam Maeri.)

Q. You examined the page, and you spoke from that, or from memory, which?

A. From that paper.

The Court: You'll have to speak up.

A. From that page there.

Q. I know you have a cold, but will you zoom your voice up?

Mr. Holman: Your Honor, at this time, in view of the cross-examination of counsel and particularly in view of the fact that there was produced the checks and vouchers he asked for, and have been returned to me, in the record, and also in view of the fact that at the time 76 was admitted your Honor limited the admission for the purpose of identification of the form only, I now offer them for all purposes.

The Court: What are those that are being offered?

Mr. Holman: Those are the ones, your Honor, that the Concrete Construction Company produced from their file.

Mr. Olson: I make the same objection, your Honor, that I made before to their admission.

The Court: What was the objection you made before? [1847]

Mr. Olson: Your Honor, I objected before on the ground that the original checks were the record of payment, not those vouchers; that they were only part of the document, had some matters on there which they had typed on them; they were not a complete record of payments, and that if they

(Testimony of Sam Macri.)

wished to introduce them, that the complete record of all the payments should be introduced, and not just a portion of the payment or a portion of the payments.

Mr. Holman: Yes, your Honor, and at that time, and I say again now, that I am going to have a complete accounting, including all the checks, but meanwhile counsel has interrogated Macri with respect to those particular vouchers.

The Court: He asked him, as I recall, whether they all had vouchers attached, and he said some did, or two didn't; what is the materiality?

Mr. Holman: Nothing, except perhaps an abundance of caution. I was under the opinion counsel asked something substantive on that.

The Court: I don't recall that.

Mr. Holman: Then I withdraw the offer, and allow it to stand as it had been previously admitted, so far as our case is concerned.

The Court: It is my understanding that there's no [1848] dispute in this suit as to the amount of payment made by Mr. Macri to the plaintiff in this contract, 1062; am I correct in that?

Mr. Holman: Within a matter of just a little difference in balances, your Honor.

The Court: I thought that in the pre-trial conference it was agreed that \$32,000.00, or something of that sort, I don't remember the exact amount, but I thought the amount paid was agreed upon at the conference?

Mr. Holman: That is correct.

(Testimony of Sam^y Macri.)

The Court: Then what is the materiality of showing payments by Mr. Macri? Is it the timely payments, or the amount of particular materials, or what is material, if the payment altogether is not disputed?

Mr. Holman: The only thing I have, your Honor, would be a proffer of all the vouchers. I'm not ready to do that now, and there has been a statement between the parties that I wish to prove in connection with the amount that's admitted, and the balance that's due. In other words, we find that Mr. Hendershott's account as to the amount received is identical, but there is some question of other charges.

The Court: All right.

(Whereupon, memo to Macri from [1849] King was marked Defendant Macri's Exhibit No. 86 for identification.

(Whereupon, a memo was marked Defendant Macri's Exhibit No. 87 for identification.

(Whereupon, a memo was marked Defendant Macri's Exhibit No. 88 for identification.

(Whereupon, a memo was marked Defendant Macri's Exhibit No. 89 for identification.)

Redirect Examination

(Continued)

By Mr. Holman:

Q. Handing you what have been marked Macri's identifications 86, 87, 88 and 89, will you tell me,

(Testimony of Sam Macri.)

please, how those came into your hands, and from what source they came to you? Where did you get them, Mr. Macri?

A. I got them from the superintendent on the job, whoever was in charge on the job.

Q. And who is represented by the initials S.R.K. on Macri's 86 for identification?

A. That's Mr. King.

Q. And who, sir, if you recall, sent the one marked Macri's 87 for identification? Do you know? If you know, all right; if you don't, all right, Mr. Macri. Do you know?

A. No, the mark isn't on, I guess.

Q. And who with respect to Macri's 88?

A. Mr. Ashley.

Q. All right, now with respect to Macri's 89, who, if you [1850] know?

A. No, there's no name here on that.

Q. Well, Mr. Macri, what I'm asking is, do you know who sent it to you, or don't you?

A. It's one of the superintendents on the job, but I don't know which one.

Mr. Holman: All right, sir. That's all, Mr. Macri.

The Court: Any recross?

Mr. Olson: Yes, there is. Are you going to offer these last identifications?

Mr. Holman: Which?

Mr. Olson: These last ones that the Clerk has.

Mr. Holman: Oh, no, I just had him identify them, is all.

(Testimony of Sam Macri.)

The Court: You may cross-examine him with reference to these identifications if you wish.

Recross-Examination

By Mr. Olson:

Q. Mr. Macri, on redirect examination counsel showed you this sub-contract on 1068, and two calendars, and asked you if you could then state whether or not the contract was signed on the date that it bears, and you said it was signed on the date that it was dated. How do you fix it as that date? How did you fix it as being signed on the date that it bears? [1851]

A. Well, we agreed that when we got together to sign, that's 1068 you're talking about?

Q. Yes.

A. Well, that 1068's been signed in my house.

Q. But how do you now say it was signed on the 21st of April, 1944?

A. Well, the contract was signed that day.

Q. What day was it?

A. On the 21st of April, 1944.

Q. Well, how do you fix it as being on that day?

A. Well, if I remember right, Mr. Schaefer say he come in over there in Seattle, and if it is prepared, we'll sign it.

Q. But how do you fix it as being the 21st of April, now?

A. Well, it was fixed because he told me he come in on that; that's why we put that date on the contract.

(Testimony of Sam Macri.)

Q. You said yesterday you thought it was signed on Saturday or Sunday. You thought it was Sunday.

A. My mind wasn't fresh; I'm not sure, though.

Q. Now, today you say it was signed on the 21st of April. I'm asking you how you fix it as that date?

A. Well, just as I tell you a minute ago, it was set up for that date and he come over and signed it.

Q. Now, isn't it a fact that it wasn't this contract but the other contract that was signed out at your home? [1852]

A. No, sir, I'm positive this is the one that was signed at home.

Q. And the 21st of April, 1944, was on a Friday, wasn't it? A. Yes.

Q. So now today you say it was on Friday it was signed? A. That's correct.

Q. It wasn't typed up at your home, was it?

A. No.

Q. So it had already been typed up before you took it home?

A. It was already typed up, and Mr. Schaefer say he come in through Seattle, and we make an appointment to meet him home and sign it.

Q. And you now remember, today, though you didn't remember yesterday, that was on Friday, the 21st of April, 1944?

A. I don't say I was positive yesterday.

Q. But today you're positive?

A. Well, my mind is freshened by looking at that.

(Testimony of Sam Macri.)

Q. Pardon?

A. Well, my mind is freshened by looking at that.

Q. You had that contract in your hand yesterday, didn't you?

A. I don't know if I looked at that or not.

Q. Matter of fact, Mr. Macri, you don't know anything about the date except what the contract says, do you?

A. I wouldn't say that; my mind is freshened now, when the contract was prepared, and we make an appointment to sign [1853] that contract.

Q. Your mind is fresher today that it was yesterday?

A. Customarily, usually, it is done that way, when we prepare a contract.

Mr. Holman: Your Honor, I just couldn't hear that.

The Court: Read that.

(Whereupon, the reporter read the last previous answer.)

Q. (By Mr. Olson): Now, counsel asked you on redict examination, Mr. Macri, why this lumber for the stilling pool and chute was not delivered until the first part of February, and you said that Mr. Darcy told you he didn't need it until the end of the job? A. Yes, he did.

Q. Did Mr. Darcy tell you that?

A. Yes, Mr. Darcy personal tell me once, for the stilling pool he don't need it, because that's the last operation he going to do.

(Testimony of Sam Macri.)

Q. So you got an order for it that you know of as early as July or June, I don't know when you said it was?

A. Well, the slip is over there.

Q. At the same time was it Mr. Darcy told you he didn't need it until the end of the job?

A. I insist myself to get a list on those lumber; in fact, I been insist times after times. [1854]

The Court: Just a moment. Strike that. Read the question. See if you can't answer these questions. Pay attention to them.

(Whereupon, the reporter read the last previous question.)

The Court: Now, do you understand the question? A. Yes.

Mr. Holman: Well, I don't know whether the witness answered yes to the question, or yes that he understood it.

The Court: He answered yes that he understood it, I assume.

Mr. Olson: I'll ask it again.

Q. (By Mr. Olson): Mr. Macri, Mr. Ashley relayed to you, as I understand it, an order for lumber for the stilling pool and chute, sometime in June or July; do you recall that?

A. Well, whenever the date is, over there on the slip, he sent the order in.

The Court: Wait a minute; what slip are we referring to, here. A. This order.

(Testimony of Sam Macri.)

The Court: Is that an order from Darcy?

A. Well, my superintendent sent that, the engineer there.

Q. But Mr. Darcy wasn't there then, was he?

A. I can't prove that he was there on that particular day. [1855]

Q. Well, when did Mr. Darcy tell you, Mr. Macri, that he didn't want the lumber for the stilling pool until the end of the job?

A. That was long afterwards what I placed that order, when he told me.

Q. When did he tell you that?

A. Well, that was when they was pouring concrete in the structures, then.

Q. Well, when was it, Mr. Macri, and where were you?

A. That must have been in the month of September sometime, if I recall it right.

Q. In September sometime?

A. Yes. I call his attention about this lumber, it was hard to get it, and I wasn't able to get it yet, this flooring, and he said "Well, I don't need it until the end of the job anyhow."

Q. Isn't it a fact Mr. Darcy had been trying to get that lumber for the stilling pool and chute ever since June, 1944, and ordered it as many as four times, and you didn't get it there until February, 1945?

A. I ain't got no recollection of that.

Q. Now, did I understand you to say that Mr. Staples—that Mr. Schaefer was responsible for Mr. Staples to leave this job?

(Testimony of Sam Macri.)

A. He sure tell me he wouldn't pour concrete till Staples [1856] was on the job.

The Court: Read that, I didn't understand that.

(Whereupon, the reporter read the last previous answer.)

Q. Now, and you said that was on June 14 that you and Mr. Schaefer had a telephone call and Mr. Schaefer said that? A. Yes.

Q. What is your number in Seattle? Telephone number?

A. Which one? We have several 'phones.

Q. Well, give me all of them.

A. I can't think of the number.

Mr. Holman: I think I can supply the number.

Q. Well, he ought——

A. Well, one was Main 3083, in Seattle.

Q. Main 3083? A. Yes.

Q. Now, what other numbers do you have.

A. I don't remember the other office number now.

Q. What?

A. I don't remember the other office 'phone number now.

Q. Do you know what your home number is?

A. Oh, yes, my home number is East 1466.

Q. East 1466? A. Yes.

Q. And you don't know what the other number is, of your [1857] other office?

Mr. Holman: Just a minute. That's the Stadium Homes, is that the one you're talking about?

A. Yes.

(Testimony of Sam Macri.)

Q. Is that the one that is Main 3083?

A. No.

Q. What is your Stadium Homes office?

A. That office has been closed for three years.

Q. Do you know what the number was there?

Mr. Holman: I have that, and his bridge job number; they're all in the book at that time.

Q. Is this Main 3083, was that your number in 1944? A. In Seattle?

Q. Seattle. A. Yes, still is.

Q. You don't know what your Stadium Homes number was, though, at that time?

Mr. Holman: I can supply the number from my desk.

Q. Do you remember the prefix of it?

A. I can't tell you that either, offhand. That's a long time ago. That office has been closed about three years now, I imagine.

Q. You don't know whether it was a Seneca number or a Prospect number? I wish you could get that.

Mr. Holman: I'll do my best to get it for you. Now, [1858] you want the Stadium Homes number?

Mr. Olson: I want to know whatever numbers he had over there.

Mr. Holman: Within what time? He has different telephones when he has different jobs.

Mr. Olson: I would like to have it through 1944.

Mr. Holman: I'll endeavor to do my best, considering it is Saturday, and I don't know whether

(Testimony of Sam Macri.)

we can get the service from the 'phone company, or Sunday, but I'll try it, though.

Mr. Olson: I would like to have Mr. Macri, if it could be, have Mr. Macri have a record of his long distance 'phone calls, particularly for the month of June, 1944.

Mr. Holman: Yes, that's all right.

The Court: Any further questions of this witness?

Mr. Hawkins: No questions, your Honor.

The Court: Mr. Holman?

Mr. Holman: No, your Honor — yes — just a minute.

Redirect Examination

By Mr. Holman:

Q. There's one place again the record there that I want to understand what you say, and what you mean. Did I understand you to say that Mr. Schaefer wouldn't pour till Staples was on the job? A. Yes, sir. [1859]

Q. What do you mean by "till"?

Mr. Olson: Your Honor, that speaks for itself. He may not have said what you wanted him to say, but I think he said that two or three times.

The Court: Well, I think under the circumstances he should be permitted to explain.

Q. (By Mr. Holman): Explain what you mean, Mr. Macri. Do you mean Staples wasn't on the job, and Schaefer wouldn't pour until he came on the job, is that what you mean?

(Testimony of Sam Macri.)

A. No, you see, he put up to me, he say Staples don't agree with him, and he don't care for him. In fact, I told him "Mr. Staples is the one that recommended you."

Q. Please, that isn't what I asked you. What do you mean by saying Schaefer wouldn't pour till Staples was on the job? What do you mean, that Staples had to come on the job?

A. He tell me I have to fire him before he pour concrete.

Mr. Holman: All right; that's all.

Recross-Examination

By Mr. Olson:

Q. Just a minute. Do you mean to say that Mr. Schaefer told you that you had to fire Mr. Staples?

A. Yes, that's just the words he used, and I told him he take too much power by doing that.

Q. And that's the same day that you called Schaefer, on June 14, 1944? [1860]

A. Well, that was when we had our conversation.

The Court: I didn't get that answer.

(Whereupon, the reporter read the last previous answer.)

Q. Now, isn't it a fact, Mr. Macri, that Mr. Staples simply didn't know how to figure out the fine grade elevations from these structure lay-out plans? A. In my opinion he did.

(Testimony of Sam Macri.)

Q. Well, you can't read them yourself, can you, Mr. Macri?

Mr. Holman: I object to that as argumentative, your Honor.

The Court: Well, I'll overrule the objection.

Q. Did you fire Mr. Staples, did you?

A. Not exactly fired; I bring an engineer over there so to settle everything up, and I thought that would be the best way out.

Q. Did you fire Mr. Staples, discharge him?

A. No, I wouldn't say exactly fire him; I just tell him about it, and he said it was alright with him anyhow, to get an engineer on the job, the circumstances the way they were.

Q. He said it was all right with him if you got an engineer on the job? A. Yes.

Q. And one that understood these plans, is that what he told [1861] you?

A. No, he told me he understood himself, everything.

The Court: I can't hear that.

Mr. Holman: Mr. Macri, nobody can hear you.

A. I say, Mr. Staples told me he understood how to do that operation himself, very well.

Q. But that you wouldn't give him any men to help him do it, is that what he told you?

Mr. Holman: I submit this is not proper cross or recross.

Mr. Olson: He's saying we made him get rid of his foremen, and that's why he had so many.

The Court: I'll overrule the objection.

(Testimony of Sam Macri.)

A. Every man on my job had a free hand to hire and fire and do whatever they please.

Mr. Olson: I move that be stricken as not responsive.

Mr. Holman: I join.

The Court: Well, read the answer.

(Whereupon, the court reporter read the last previous answer.)

The Court: I'll permit it to stand. I think you asked him if he didn't refuse to give Staples enough men.

Mr. Olson: I asked him if that wasn't what Mr. Staples said to him. [1862]

The Court: Well, the motion to strike will be denied.

Mr. Olson: That's all.

Mr. Holman: That's all, Mr. Macri.

(Whereupon, there being no further questions, the witness was excused.)

NIELS W. HJORTH

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Will you please state your name and your place of residence?

A. My name is Niels W. Hjorth. I live at 2653 Southwest 172nd, Seattle.

(Testimony of Niels W. Hjorth.)

Q. And what is your business, Mr. Hjorth?

A. Now?

Q. Yes, sir, what business are you in?

A. We're national distributors for Solo all purpose cream, right now.

Q. In 1944 I'll ask you whether or not you were in any manner employed by or associated with Mr. Macri, S. M. Macri, Sr., or Macri & Company?

A. I was employed.

Q. And what was your capacity at that time?

A. Estimator, purchase agent. [1863]

Q. You did or did not estimate on this job, Mr. Hjorth?

A. No, I did not estimate that job.

Q. I'll ask you whether or not with respect to plaintiff's Exhibits 5 and 6, which are the sub-contracts between M. C. Schaefer—pardon me—between the Concrete Construction Company and Macri and Company for specification 1062, schedule 1, and specifications 1068, of the Roza Project, now, referring to those, I'll ask you whether or not you were present or had anything to do with the preparation of these two? Will you look at them, please? I want to add to my question, Mr. Reporter, which are both executed copies.

A. Yes, I framed the contracts.

Q. Now, first, with reference—you said you did what?

A. Yes, I framed the contracts.

Q. What do you mean by framed?

A. Well, filled in the sub-contract forms.

Q. Now, first with reference to Exhibit 5, the contract covering 1062, will you please tell the

(Testimony of Niels W. Hjorth.)

Court to the best of your recollection—listen to me, please—tell the Court to the best of your recollection who was present and what was talked between those that were present, or the persons that was present, before you put any of the typing in there, and when you put it in, and what became of it, do you know, after it was completed? [1864]

A. Mr. Sam Macri asked me to—

Mr. Olson: Just a minute. If the Court please, I was afraid of that question, it asks so many things.

Q. All right, strike the question, Mr. Reporter. I was really trying to expedite the time. Do you remember who was present at the time that you typed that?

A. I didn't type it; I filled it in with pencil, and then had it typed.

Q. All right, sir; now, where was that done?

A. Stadium Homes project.

Q. Stadium Homes project means what?

A. Stadium Homes project is a housing job in Seattle.

Q. And how did you happen to be there?

A. I worked there.

Q. All right, sir. Now, you say you filled it in with pencil? A. That's right.

Q. Do you mean that particular document, or one of those forms, or what do you mean?

A. I filled in a similar form to this one.

Q. When you filled that in who was present; and I'm directing your attention specifically to Mr. M. C. Schaefer and Mr. Sam Macri, Sr.; were they present?

(Testimony of Niels W. Hjorth.)

Mr. Olson: Well, if the Court please, that certainly is leading and suggestive. Why doesn't he just ask [1865] him who was there?

The Court: I think that would be sufficient, to ask him who was there.

Q. Who was there?

A. Mr. Sam Macri was there and asked me to fill these in, to begin with.

Q. At the start? A. Yes.

Q. Did you see Mr. Schaefer at that time, or not? A. No.

Q. Then what did you do?

A. I filled them in, and had the girl in the office type it, and then Sam Macri came back and took it, and later came back with Mr. Schaefer.

Q. Now, when you say Mr. Schaefer, you mean Mr. M. C. Schaefer?

A. Yes, that was my recollection.

Q. All right, sir.

A. And there were some things that were to be corrected. I understood at first that Mr. Sam Macri wanted this contract——

Q. Pardon me just a minute. What were you going to say—what you understood? I don't want you to answer what you understood. I want you to answer what was done.

The Court: If they were both present. [1866]

Q. Yes, while they were both present, what was said?

A. Well, when Mr. Macri asked me to fill this in, I thought that the sub-contract was to include

(Testimony of Niels W. Hjorth.)

all labor and materials to be furnished by the subcontractor. This later was changed to exclude the lumber, and that was in turn crossed out.

Q. Now, was there any conversation by Mr. M. C. Schaefer and Mr. Macri in your presence in advance of those changes being made in that exhibit?

A. I don't recollect any of the conversation between the two.

Q. And were they present while that change was being made, or not?

A. Well, they were in the office at the time, when it was brought back for these changes.

Q. And you were present? A. Yes.

Q. And you delivered it to them?

A. I had the changes made and I delivered it to Mr. Macri.

Q. And do you know whether they were read or not, while you were there? A. Yes.

Q. Sir? A. Yes, they were read.

Q. Will you tell me whether or not each had a copy and read it, or not? [1867]

A. Yes, there were about three copies made, original and two carbon copies.

Q. Now, can you tell me whether or not it was signed as of the date it bears there in the front of it, Mr. Hjorth. Can you tell me whether or not the date that you had put in there was the date it was signed?

A. I don't know which one of these contracts was signed in the office there, or whether it was actually signed in the office at that time, I don't recollect.

(Testimony of Niels W. Hjorth.)

Q. Well, you don't know whether it was signed at that time or not?

A. To the best of my recollection one of these contracts was signed in our office at that time, but I wouldn't swear to it.

Q. Well, to avoid any confusion on your part, I'll hand you the other one, Exhibit 6, covering specification 1068, and will ask you if you can remember which was, if you can?

A. No, I don't remember.

Q. All right, sir. Now, then, after the contract shown as Exhibit 5 had been prepared by you—had been changed by you, was it then in the form that it now appears to be? A. Yes.

Q. Now, with reference to Exhibit 6, will you tell the Court, please, under what circumstances you prepared that, where [1868] it was prepared, and—

A. It was prepared by myself in pencil, and typed by the girl in the Stadium Homes Project, Seattle.

Q. Well, can you tell me whether or not Mr. M. C. Schaefer and Mr. Macri were present in advance of your putting the pencil information—I understand in the blank, you took one of those blanks and pencilled it in? A. That's right.

Q. Were Mr. M. C. Schaefer and Mr. Macri present when that was being done by you?

A. No, Mr. Schaefer was not there, as I remember it.

Q. All right, sir; then it was prepared by you that way, was it?

(Testimony of Niels W. Hjorth.)

A. Mr. Macri told me what he wanted, and I prepared it afterwards.

Q. Then isn't your answer similar to this one as it was to the other, that you took your pencil copy and had it typed? A. Yes, sir.

Q. And after it was typed were you present when it was before Mr. M. C. Schaefer and Mr. Macri; were they present at any time you saw them with that?

A. I don't recollect that they were both present.

Q. And with respect to the change shown on the second page of the typed body of the contract, the handwriting, [1869] quoting: "If bond is required, general contractor to pay the premium," and the initials "M. C. S."; were those put on in your presence, or not, do you recall? A. No.

Q. You mean you don't recall?

A. They weren't; I had only the typing there, what I recollect.

Mr. Holman: Your Honor, I find that this particular copy of 1062 has been marked in several places, for emphasis; I think that it should be eliminated, probably.

The Court: Yes, the Clerk should erase that. What is it, pencil underscoring?

Mr. Holman: On the side, and things like that.

Mr. Olson: I'd like to see it eliminated too; they're probably in the wrong places.

The Court: That should be erased, any underscoring or side marking.

(Testimony of Niels W. Hjorth.)

Mr. Olson: If I did it, they're in those places I didn't like.

Direct Examination
(Continued)

By Mr. Holman:

Q. Mr. Hjorth, in what capacity were you serving with Mr. Macri at the time these agreements were drawn in 1944?

A. I was estimator and purchasing agent.

Q. And in connection with the—I'm not sure about this—in [1870] connection with the purchase of lumber for specification 1062, schedule 1, this Roza job, were you on that, or were you on the Stadium Homes only; what was your work?

A. My work was looking after Stadium Homes, together with some other jobs that we had at that time.

Q. But including or excluding the Roza?

A. I had nothing to do with that, except making out the contract.

Q. And I understand you did not make any estimates for the Roza bid? A. No.

Q. Would you state your experience in the construction field—and this is for the purpose of qualifying the witness as an expert, your Honor.

A. Well, for about twelve years I followed civil engineering and construction, and later on I followed general contracting. I was a contractor myself for fifteen years or more, and I came up to Seattle, and most of my contracting work of my

(Testimony of Niels W. Hjorth.)

own was done in California, then I came up to Seattle and went to work with the Alcan Highway, and later came back to Seattle and went to work with the Macri, Mullan, Stand and Tate, and later when they were separated I went to work with the Macri Company.

Q. The Alcan Highway you refer to is the Alaska-British Columbia highway? A. Yes.

Q. Now, in the course of your experience have you had occasion to become familiar with the manner for estimating the required amount of lumber for construction of concrete structures?

A. Yes.

Q. Has your experience on that been limited, or broad, over an extended period?

A. Quite an extended period.

Q. I'll ask you whether or not in your experience the quantity of lumber required for structures can be estimated by the cubic yardage of concrete placed?

A. No, there's so many different ways of placing concrete, if it is in a solid mass, why, it takes less form than it would if it had smaller walls and floor.

Q. What is the correct manner of determining the quantity of lumber required for placement of concrete in concrete structures?

A. The surface area.

Q. Now, will you explain that, please, to the Court, what you mean by the surface area?

A. Well, there are——

(Testimony of Niels W. Hjorth.)

Q. Just a minute, Mr. Hjorth. Would you please step down and come over here to this model? With reference to what has been admitted in evidence as plaintiff's Exhibit 26, [1872] representing a poured form, will you indicate to the Court what surface areas you have in mind in your answer to me?

A. The sides on the exterior and also on the sides on the interior, and the bottom of any floor above the ground.

The Court: Recess for ten minutes.

(Short recess.)

(All parties present as before, and the trial was resumed.)

Direct Examination

(Continued)

By Mr. Holman:

Q. Mr. Hjorth, have you had opportunity since you came from Seattle to consult the records and the documents and the other information to determine the quantity of lumber required for performance of the concrete excavation quantities on specification 1062, schedule 1? A. No.

Mr. Holman: You may inquire.

Cross-Examination

By Mr. Olson:

Q. Mr. Hjorth, you say that in determining the quantity of lumber required for concrete forms, for concrete structures, it is based on the surface area; surface contact area, I take it you mean?

A. Yes.

(Testimony of Niels W. Hjorth.)

Q. Now, is it possible to then transmit that into the amount required per cubic yard of concrete?

A. Well, the way to determine your form work is to figure all of your surface area, and you have to figure your structure, your curlers, your placing, and all the lumber that goes into the form work.

Q. And you can determine, then, how much is required per cubic yard of concrete, can't you?

A. Yes.

Q. And handing you plaintiff's Exhibit 3, and calling your attention to item 12, concrete in structures, that calls for a bid of lumber per cubic yard of concrete, does it not? A. Yes.

Q. So in order to bid on that item one would have to figure the lumber per cubic yard of concrete? A. Yes.

Q. Now, referring to plaintiff's Exhibit 5, I believe you said that you prepared that?

A. Yes, I did.

Q. Now, as I understand it, Mr. Hjorth—

A. Pronunciation is the same as Yort.

Q. Thank you—that the X'ing out of part of the typewritten matter was done in order to show that Mr. Macri would furnish the form lumber instead of Mr. Schaefer? A. That's right.

Q. And that was the only reason that the change was made? [1874]

A. Well, I think I had all materials in there was to be furnished, and that was a mistake on my part, I guess, because I think if I recollect, the government was to furnish the steel.

(Testimony of Niels W. Hjorth.)

Q. Well, I'm asking you, Mr. Hjorth, though, the reason you made that change was to place the responsibility upon Macri and Company to furnish the form lumber, and not Mr. Schaefer?

A. That's right.

Q. And that's the only reason you made that change?

A. Yes.

Q. And your recollection was that that was not made after Mr. Schaefer came back?

A. Well, on one of these contracts Mr. Schaefer was over there. Which one, I don't recollect.

Q. Then you're not sure, Mr. Schaefer was there when that change was made, are you, Mr. Hjorth?

A. Mr. Schaefer was there at the time one of these contracts—were both of these contracts for the Concrete Construction Company?

Q. Yes, they are, Mr. Hjorth. Handing you also plaintiff's Exhibit 6, you're not sure just which one of those contracts it was that Mr. Schaefer was present when it was signed?

A. If you will excuse me a minute I'll look at this. This [1875] is the one here.

Q. You're referring to Exhibit 5? You saw Mr. Schaefer sign Exhibit 5?

A. No, I don't remember about the signing.

Q. Well, that's what I wanted to get at. You weren't present, as a matter of fact, when Mr. Schaefer signed either one of these contracts, were you?

A. I don't remember whether they were signed in my presence or not, because I was busy with a

(Testimony of Niels W. Hjorth.)

lot of other things, and I helped fill them out, and when the changes were made, I didn't pay any more attention to it.

Q. Mr. Schaefer wasn't present, was he, Mr. Hjorth, when even this change was made at the bottom of page numbered 1 of the contract?

A. He was over in the office at the time when we made those changes, yes.

Q. Now, Mr. Hjorth, asking you to look at that part that's X'd out closely, and I'll ask you whether or not the form lumber was not already excluded before you X'd that out? A. No.

Q. Can you read it through there?

A. Wait until I get my glasses on, I probably can. Well, the way it reads to me, if I am correct "to furnish all labor and materials except form lumber and re-enforcing [1876] steel."

Q. Yes, so the form lumber and re-enforcing steel were already excluded, weren't they?

A. It appears they were.

Q. Yes, so that wasn't X'd out, then, in order to eliminate the lumber, was it?

A. No, evidently not.

Q. So now, isn't it a fact, Mr. Hjorth, that that change was made in there before Mr. Schaefer ever got there?

A. Well, there were some changes and additions made in this contract the time he was over there.

Q. But you don't know what they are or why they were made, or do you?

(Testimony of Niels W. Hjorth.)

A. It was on account of materials; Mr. Schaefer was to furnish some materials and Mr. Macri was to furnish some materials.

Q. You just don't now recall what it was?

A. It was three years ago, and it's kind of hard to remember that.

Q. I appreciate that, and if you don't remember, if you'll tell me, so I'll not ask you about it; if you do remember I would like to know.

A. All I remember now is that there were changes made at that time.

Q. But just what they were, or what they were for, that you [1877] do not recall?

A. My recollection was that it was on account of lumber that was to be excluded from the contract.

Q. That's your recollection? A. Yes.

Q. You are an attorney, Mr. Hjorth?

A. No.

Q. You've never been admitted to the bar?

A. No.

Q. Are you a graduate engineer? A. No.

Mr. Olson: That's all.

Redirect Examination

By Mr. Holman:

Q. I'm interested, Mr. Hjorth, in your answer to counsel's question with reference to Exhibit 3, and calling your attention to the schedule number 1, item 12, concrete, 1515 cubic yards; now, can you from that item alone, without other informa-

(Testimony of Niels W. Hjorth.)

tion, determine the quantity of lumber as an estimate that would be required for the job?

A. No.

Q. What else would you have to consult?

A. I would have to have the plans showing the sizes of the structures.

Q. And in advance of that could you determine the lumber? A. I could from the plans.

Q. Yes, but without the plans could you?

A. No, it is impossible.

Q. So is it or is it not a fact that if somebody said to you "Item 12 in a contract calls for 1515 cubic yards of concrete placed; tell me how much lumber you need to place that concrete," could you answer, or not?

A. You couldn't tell how much lumber was necessary for it without the plans.

Q. Explain to the Court why, will you?

Mr. Olson: Your Honor, there is no controversy about that at all.

Mr. Holman: I understood counsel to ask him if off of that alone he could determine——

Mr. Olson: I understood you to say you couldn't figure lumber by the cubic yard.

Mr. Holman: I still say that.

Q. (By Mr. Holman): Can you, Mr. Hjorth, figure the board lumber required by knowing the quantity of concrete alone? A. No.

Mr. Holman: That's all.

(Testimony of Niels W. Hjorth.)

Recross-Examination

By Mr. Olson:

Q. Then as I understand it, Mr. Hjorth, unless one also had the plans and specifications, it would be utterly impossible to submit a bid on item 12 of these specifications, unless they also had with it detailed plans showing [1879] the size and elevations of the structures of the type that you have seen in the model exhibit here in the courtroom?

A. Unless you have some other plans in here showing the sizes and the measurements for those structures, you couldn't do it.

Mr. Olson: Thank you; that's all.

Redirect Examination

By Mr. Holman:

Q. In other words, Mr. Hjorth, would the matter of the amount of lumber be one of speculation until you had plans? A. Yes.

Mr. Holman: Thank you; that's all.

(Whereupon, there being no further questions, the witness was excused.) [1880]

Mr. Holman: I would like to call Mr. M. C. Schaefer out of turn, under the rule, as an adverse witness, your Honor.

The Court: All right.

Mr. Olson: What do you mean, out of turn?

Mr. Holman: Strike out of turn; as an adverse witness under the rule.

M. C. SCHAEFER

the plaintiff, called by the defendants Macri as an adverse witness, resumed the stand and testified further as follows:

Direct Examination

By Mr. Holman:

Q. Mr. Schaefer, are you the one person who can tell me the quantities of concrete that were placed during the operations of the Concrete Construction Company on specification 1062, schedule 1? [1881]

A. I can by referring to the record, yes.

Q. Is there anyone more able to do so than yourself, more expeditiously to do so?

A. I don't believe so.

Q. All right, sir. I'll ask you, please, if you will tell me whether or not during the month of May, 1945, you placed 94.76 cubic yards of concrete?

A. During the month of May?

Q. Pardon me; April, 1945.

A. Month of April?

Q. Yes, sir.

A. How many yards?

Q. 94.76. Specifically, I am directing your attention, Mr. Schaefer, to Macri's identification 17, a letter of May 21, 1945, to the Concrete Engineer from the Construction Engineer, and to the second paragraph thereof, referring to specification 1062, schedule 1, and the figure 94.76 cubic yards.

A. Now, then, that—their figure about goes from the 25th of one month to the 25th of the other. I

(Testimony of M. C. Schaefer.)

could refer back to my record to see just what yardage was poured, or number of batches, rather.

Q. And would your answer be so with respect to each of the cubic yardages shown in similar reports for each of the months covering the periods that you were placing concrete [1882] in the structures?

A. Well, our batching—the engineer's estimate would vary a bit with our record, because they had the actual size, they computed the actual size of the batches, where we counted by the batch, but they should be very close.

Q. Then is it or is it not a fact that the current monthly reports in this document, these documents, which I have indicated to you for the respective months that you were placing concrete would be a reasonable and fair gauge of the performance of placing concrete by your organization?

Mr. Olson: Now, that's objected to, unless the witness is given an opportunity to examine each of the documents that counsel is referring to.

Q. Well, I'll give him that opportunity, but I understood from the witness' last answer, I maybe misunderstood you, Mr. Schaefer; I thought you said that they were reasonably comparable, correct?

A. That is, the engineer's estimate was reasonably comparable to our daily reports for each month's estimate of quantity, with an exception here that there were poured, I believe, about 178 yards more of concrete than the engineer's estimate.

(Testimony of M. C. Schaefer.)

Q. All right, Mr. Schaefer; do you have some tabulation that you can consult there as against these reports that I'm interrogating you upon, and tell me whether or not the [1883] reports are reasonably representative of the concrete that was poured—that was placed?

Mr. Olson: Now, if your Honor please, it is immaterial, it seems to me, whether or not these records are accurate or not; if counsel wants to ask this witness what we did pour, and have him testify as to that, that's something else; but to have him establish the correctness of some engineer's reports, that's not in issue in this case.

Mr. Holman: Very well, I'll proceed that way. Will you please get the records and have them there on the stand? I want to ask you about some monthly performances here with respect to placing concrete.

The Court: Are those records in such condition that you can sort them out soon, Mr. Schaefer?

Witness: I believe so.

The Court: I don't propose to wait here indefinitely for Mr. Schaefer to pick out some records, unless you have given him notice to prepare them in advance.

Mr. Holman: No, I didn't; I didn't contemplate that I would be required to do that. I'll withdraw Mr. Schaefer from the stand now.

The Court: Well, if you will tell him what to get, maybe he can have them for you Monday.

Mr. Holman: I can't tell him what to get.

(Testimony of M. C. Schaefer.)

The Court: Well, you want his monthly reports of concrete poured, don't you?

Mr. Holman: That's right, your Honor. Mr. Schaefer may be withdrawn.

Mr. Olson: Will you have that ready, Mr. Schaefer? What I understand he wants is our records showing the cubic yardage of concrete poured each month.

The Court: Yes, that's right. Are those records there so he can get them soon?

Mr. Holman: I want the amount of concrete placed according to the specifications.

The Court: Each month?

Mr. Holman: Each month, yes.

Mr. Olson: He says he has it now, if you wish to proceed.

Mr. Holman: All right.

Direct Examination

(Continued)

By Mr. Holman:

Q. Will you give me the amount of concrete placed in structures on specification 1062, according to the records of the Concrete Construction Company, for the month of April, 1944?

A. I haven't got April here on that. I've got up to and including March. I fail to have April.

Mr. Olson: He's saying April, 1944. [1885]

A. Of 1945?

Mr. Olson: I think the testimony is we didn't pour any until the 29th of July.

(Testimony of M. C. Schaefer.)

Q. Yes; I'm asking about April, 1944. Did you pour any—did you place any concrete in structures? A. Of course not.

Q. All right; May, 1944? A. No.

Q. June, 1944? A. No.

Q. July, 1944?

A. July of 1944 we placed four batches.

Q. Four batches of concrete exhausts how many sacks of cement?

A. I believe it was four sacks to the yard of concrete—six sacks per yard of concrete, that would be 24 sacks.

Q. Is it or is it not a fact that in March or in April you received from the government 665 sacks of cement? A. In April?

Q. April, 1944, and none of that was used until July, 1944, correct?

A. That's right; I believe that's correct.

Q. All right. Give me, please, the quantity of concrete that you placed in July in the structures, July, 1944.

A. Four batches. [1886]

Q. I thought you were going to give me yardage? Can you do it?

A. I'll not be able to give you yardage, because that's computed by the engineers, as the batches are larger than one cubic yard of concrete.

Q. Are you able from your answer as to batches to give me the quantity of concrete placed in the forms?

A. There's four plus yards for the month of July.

(Testimony of M. C. Schaefer.)

Q. The month of July is how many batches?

A. Four.

Q. And that's how many sacks?

A. That would be about 24 sacks.

Q. All right, sir; in the month of August how many batches?

A. Month of August there's $162\frac{3}{4}$ batches.

Q. And how many sacks?

A. Well, six times that. I haven't got a calculator here, unless you wish to wait.

Q. Times six will equal it?

A. I believe that's right, yes.

Q. Six sacks to a batch, is that it?

A. That's right.

Q. All right, sir. The month of September?

A. $131\frac{1}{2}$.

Q. How many yards, cubic yards of concrete placed, that 4 batches and $162\frac{3}{4}$ batches would yield? [1887]

A. Will you repeat that again, please?

Q. Yes. How many cubic yards of concrete placed in the structures do you say that 4 batches plus $162\frac{3}{4}$ batches would yield, in concrete placed in the structures?

A. 4 batches and $162\frac{3}{4}$?

Q. Yes.

A. In other words, $166\frac{3}{4}$?

Q. Here, I'll give you a pad to figure on.

A. I have a pad. $166\frac{3}{4}$ batches——

Q. Yes, sir; equals how many yards?

(Testimony of M. C. Schaefer.)

A. I believe at that time they were computing on the basis there of about 1.11 yards of concrete to the batch.

Q. Well, do you have to compute that, or can you tell me?

A. I don't have the Bureau's figures on that.

Q. Just your estimate; I'm just trying to get your estimate of quantity of concrete placed in the structures for those two batches.

A. Well, then, I'll qualify what I have to say in that respect a little further. I did ask, I believe it was Harold Nelson, what the average yield was, and if I remember right——

Q. I'm just not interest in conversation; I want your——

A. Well, I don't know.

Q. All right, sir; then you can't tell me from your record of batches what amount of concrete was placed in the [1888] structures, can you?

A. I'd say at that time there was about another 185 yards.

Q. 185 cubic yards, for the months of July and August, correct?

A. I believe that's about it. That's basing it on 1.11 yards per batch.

Q. All right, sir. Then would you say, Mr. Schaefer, that the report contained from the Concrete Construction engineer to the Concrete Engineer in a communication of September 19, 1944, that there had been placed 180.5 cubic yards of concrete in 87 structures was a fair statement?

A. Yes.

(Testimony of M. C. Schaefer.)

Mr. Holman: I offer in evidence, your Honor, or I'd like to have marked for identification the same as was previously offered, your Honor, the heading and then the asterisks and then the particular paragraph with respect to specification 1062.

Witness: Pardon me, I want to clarify a little bit right here on that. The Bureau computes that from their plans at their job office, I mean at their office, and that doesn't take into account the over-run, so there may be the difference between the engineer's data there and the actual quantity, which they check, as one of their engineers testified here, that the amount that went [1889] through the mixer—

Q. Yes; now don't you know from your experience in connection with this job, and as a matter of fact, the reports to which I am directing your attention is a matter of batching report, or is this concrete placed in the forms?

A. That there is the engineer's daily report.

Q. Yes, sir. This says, as I remember the figure, 180 some odd cubic yards of concrete placed in so many structures. Now, I ask you if that is a fair comparable amount with your batching record which you are giving me for the period indicated?

A. Yes.

Q. All right.

A. Their data out there in the field wouldn't necessarily be to the exact yard, when they send in their dope to their office.

Q. Similarly, Mr. Schaefer, if it can be done, at your convenience during the interim until the

(Testimony of M. C. Schaefer.)

next session of court will you determine and tabulate the batches for the months of October, November, December, 1944, and January, February, and March, 1945?

A. I have the number of batches right here.

Q. You have, sir? All right. Then what do you have for September? I think you gave me 131½, did you not?

A. That's correct. [1890]

Q. And I'll ask you whether or not the statement in a communication from the Construction Engineer to the Concrete Engineer on October 23, 1944, in specification 1062—pardon me, schedule 1, of placing 142.75 cubic yards of concrete in 65 structures is a fair——

Mr. Olson: Just a minute. Your Honor, I object to that as being wholly immaterial, whether the statement made in some communication from somebody in the Bureau of Reclamation is a fair statement or is not a fair statement. It's wholly immaterial as far as this lawsuit is concerned.

Mr. Holman: I'm asking if it is a fair representation of the quantities comparable with your batches.

Mr. Olson: That also is immaterial, whether or not our records fairly compare with a letter that somebody wrote to the Bureau of Reclamation.

The Court: I don't get your purpose. Are you trying to elicit the testimony of this witness as to what his records show, or are you trying to get him to identify these documents so that you may admit them in evidence?

(Testimony of M. C. Schaefer.)

Mr. Holman: I'm trying to get a statement from the witness of a comparable difference, or an amount of the difference. I'm using it as a guide.

The Court: Is it your position if he says [1891] they are approximately the same that would make it admissible?

Mr. Holman: No; if he says they are practically comparable I would have his testimony.

The Court: Why don't you make a statement of whether they compare?

Mr. Holman: I was trying to avoid his testimony. That's why I asked for it over the recess; it would save a lot of time.

Mr. Olson: If he wants to ask this witness what concrete he poured each month, the witness has the figures, and he can give them. It is wholly immaterial and irrelevant whether or not our figures compare or are the same or similar to the figures written from one officer of the Bureau of Reclamation to another officer of the Bureau of Reclamation.

Mr. Holman: My point is this, and this only, may it please the Court: Mr. Schaefer has answered me he can't give it to me except by batches, and it will take a computation on a basis of approximately 1.11 to determine.

Witness: That has varied, and you didn't allow me to finish my answer a little while ago wherein Mr. Nelson told me that the average was less than that.

(Testimony of M. C. Schaefer.)

The Court: That will be stricken. Just answer questions that are asked you. [1892]

Direct Examination
(Continued)

By Mr. Holman:

Q. If you can give me the yardage that was placed in structures in the months of June, July, August, September, October, November, December, 1944, and January, February and March of 1945, please give it to me.

The Court: If Mr. Schaefer can compute only batches, and can't change them into yardage, how can you tell whether those figures of yours are correct, in your documents?

Mr. Holman: I'm only asking them if they are reasonably representative of his answer as to batches.

The Court: How can he tell, if he doesn't know how many batches in how many yards?

Mr. Holman: He does, your Honor. He says 1.11, from certain explanations.

The Court: I judge from what's been stricken that that's what somebody else told him.

Mr. Holman: I don't care who told him. He can answer me if he can give me yards.

Witness: I'll give you batches. I won't take the yards.

Q. And you would not be able to give me the cubic yards of concrete placed in any of these months that I've indicated?

(Testimony of M. C. Schaefer.)

A. I'll give you the batches. You asked, what was the last [1893] previous question there, on around 148 yards?

Q. Well, Mr. Schaefer, would you permit me to ask the questions? I asked you if you can, you say you can give me the batches. Now, instead of the batches, can you give me the cubic yards according to your records, placed in the structures on specification 1062, schedule 1, for the months I've called?

A. I can give you the number of batches, but as to the yardage, I can't give you that because of the variation.

Q. That's what I thought you told me before. Will you please call the batches for the respective months that I've indicated, Mr. Schaefer?

A. O.K.

Q. You've given me for July.

The Court: He's given them up including September.

Q. Now, October, number of batches.

A. Well, then, in October, they're between the 26th or 25th of one month and the 25th of the next, there were 148 batches.

Q. 148 batches in October?

A. That's correct.

Q. What in November?

A. In November there were 222 batches.

Q. All right, sir. What in December? [1894]

A. December, 66 batches.

Q. Yes, sir; and what in January?

A. 144 batches.

(Testimony of M. C. Schaefer.)

Q. Yes, sir; and what in February?

A. 188 batches.

Q. And what in March?

A. March was 40 batches.

Q. Yes, sir. Now, was it those batches which you have given me upon which you base your estimate of 150 feet, board measure, to the cubic yard of concrete, as the true test of lumber required?

A. No, that's based on surface feet of form in a representative number of structures, and dividing through that by the number of yards of concrete contained in those structures.

Q. Now, isn't it a fact, Mr. Schaefer, that the way you arrived at the 150 board feet per cubic yard of concrete placed in structures was to take the performed quantity which the government has fixed and divide that by the amount of lumber that you know you had, and your result was your 150?

A. No.

Mr. Holman: You may inquire.

Mr. Olson: No questions.

The Court: Any further questions? [1895]

Cross-Examination

By Mr. Hawkins:

Q. Mr. Schaefer, do you have any difficulty understanding Mr. Macri? A. Do I?

Q. Yes.

A. I think I can understand him pretty well.

Q. You understand him pretty well?

A. Uh huh.

Mr. Hawkins: That's all.

(Testimony of M. C. Schaefer.)

The Court: Any other questions?

Mr. Holman: No, your Honor. That's all Mr. Schaefer.

Mr. Hawkins: By the way, I meant his speech; is that what you meant? A. Yes.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Holman: Your Honor, I would like to offer in evidence as the progress report of the government, which according to the adverse party, Mr. Schaefer, is not disputed as to a representative showing, what has been marked identification 17-c, being the letter of September 19, 1944, from the Construction Engineer to the Concrete Engineer, and containing therein paragraph 6 the report of the amount of cubic yards of concrete placed in the number of structures indicated.

Mr. Olson: Your Honor, I object to its admissibility on all the grounds stated previously, and the further ground that the witness hasn't even seen the communication, and the mere fact that somebody writes a letter to somebody else, and we don't dispute it, certainly doesn't make it admissible in evidence.

The Court: Those documents referred to contain other matter than just the bare amount of concrete poured, Mr. Holman?

Mr. Holman: Yes, there is subdivisions, and it covers all the specifications on the job, and then they lump into specification 1062, schedule 1, all

that they have that month for a report. It is only a report; that's all it can be.

The Court: It contains statements such as, as I remember "Excavations made ahead of structures"?

Mr. Holman: Yes.

The Court: And it isn't limited to the quantity of concrete?

Mr. Holman: No, sir.

The Court: And the objection Mr. Olson made that [1897] I thought was well taken is that he has no opportunity to cross-examine the people who wrote those statements; if I admit them in evidence he can't question them at all.

Mr. Holman: No, but on this 17-c, the only portion I would want in view of the examination of Mr. Schaefer would be this: "Concrete Construction Company, sub-contractors on structures, placed 180.5 cubic yards of concrete in 87 structures"—and finish the sentence, "which is regarded as good progress for the first month's work." The rest of it is on other matters.

Mr. Olson: Your Honor, please, this particular letter here is apparently written by some fellow by the name of Tyler, and it is his summation of what somebody else reported to him; it is even that far away. Now, he's had Mr. Schaefer on the stand and testified to how many batches he poured. How that makes a letter based on what somebody else told them admissible into evidence, I can't see it. If that's admitted I suppose counsel's got 15 or 20 more.

Mr. Holman: I have one for each month, your Honor, on the question of cubic yards of concrete placed in structures.

Mr. Olson: And they're not competent.

The Court: I don't believe the testimony of Mr. Schaefer would make them admissible. [1898]

Mr. Holman: Then I presume it would do me no good to make an application to take the deposition of Mr. Tyler, who I understand is in Kansas?

The Court: What would you think?

Mr. Holman: I think it would not, your Honor. Shall I start on another witness, your Honor?

The Court: How long do you think this case is going to take, next week, or the week after?

Mr. Holman: I'm so heartened, your Honor, by the brevity of opposing counsel's cross-examination that I'm hopeful it will be completed this next week.

The Court: About how many more witnesses do you have?

Mr. Holman: About—I hadn't counted them—I think six, your Honor; maybe seven.

The Court: Well, I have a grand jury session in Spokane beginning the 25th.

Mr. Holman: Of March?

The Court: Yes, and it is necessary that I get back there, and in my judgment this case has taken much more time than it should have done now, and unless it is hurried along, we'll have to start having longer sessions and night sessions next week. We'll have to finish next week. The Court will adjourn until Monday morning at 10 o'clock.

(Whereupon, the Court took a recess in this cause until Monday, March 17, 1947, at 10 o'clock a.m.)